



# **Law and Emergencies: A Comparative Overview**

The Minerva Center for the Rule of Law under Extreme Conditions

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# **Emergency Laws and Regulations in India: Executive Summary**

## **Legislative Framework**

There are two main pieces of legislation in India directly related to emergency situations; The Constitution of India and The National Disaster Management Act of 2005 (Hereinafter NDMA). The former specifies provisions for National Emergency, State Emergency (also known as Constitutional Failure or the President's Rule) and Financial Emergencies. It does not, however, refer to natural disasters.

The NDMA provides a broader definition of disasters to include natural and man-made events which result in a substantial loss of life and destruction of property and environment.<sup>1</sup> The NDMA constitutes the institutional framework for disaster management in India, establishing the National Institute for Disaster Management (NIDM) and the National Disaster Management Authority (NDMA).<sup>2</sup> The NDMA also granted NIDM a statutory status.<sup>3</sup> NDMA, which is headed by the Prime Minister,<sup>4</sup> is responsible for implementing Disaster Management in India, promoting policies and ensure effective response to disasters.<sup>5</sup>

## **Entrance into a State of Emergency**

Since the NDMA ACT provides only an institutional framework, it does not relate to declaration of emergency in cases of natural disasters. In circumstances of war, external aggression or armed rebellion (National Emergency) a state of emergency is declared by the President but is subject to written advice by the Cabinet and approval of both Houses of Parliament with a special majority within

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<sup>1</sup> The National Disaster Management Act of 2005 (Hereinafter NDMA). Article 2(d).

<sup>2</sup> FN 1, NDMA. Article 3.

<sup>3</sup> Id. Article 42.

<sup>4</sup> Id. Article 3(2)(a).

<sup>5</sup> Id. Article 6.

a month after the proclamation.<sup>6</sup> Unless revoked, a state of National Emergency will expire after six months but may be extended.<sup>7</sup> Emergencies under Failure of Constitutional Machinery are declared by the President and subjected to the approval of the Houses of Parliament within two months.<sup>8</sup> Such state will expire after six months, but may be extended for six months each time and no more than three years.<sup>9</sup> The proclamation of a state of Financial Emergency is subjected to the approval of both houses of Parliament within two months and once approved will remain in effect until revoked by the President.<sup>10</sup>

### **Legal Powers**

Legal powers before, during and after a natural emergency are provided mainly under the Constitution or the NDMA Act, and are elaborated in the report. We are familiar with at least one case in India's history where the Government of India passed a statute that allowed it to function as the legal representative for victims of a disaster.

### **Rights in a State of Emergency**

Article 358 of the Constitution states that fundamental rights under Article 19 are suspended while a National Emergency is declared and in operation. Article 19 of the Constitution protects the rights of freedom of speech; assemble; form associations; move freely throughout the territory of India; reside and settle in any part of India and to practice any profession, or to carry on any occupation. In such an emergency, "the power of the State to make any law or to take any executive action" shall not be restricted by the protected rights in Article 19, as long as such laws or actions are in relation to the emergency. Furthermore, any such law shall cease to have effect once the proclamation terminates.

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<sup>6</sup> The Constitution of India Article 352(1)-(4)

<sup>7</sup> Id. Article 352(5).

<sup>8</sup> Id. Article 356(1)-(3) .

<sup>9</sup> Id. Article 356(4).

<sup>10</sup> Id. Article 360.

Article 359 of the Constitution provides that when a Proclamation of Emergency has been activated, an enforcement of any fundamental right may be suspended by the issue of a Presidential Order for as long as such action is in relation to the emergency and given that it is brought before both Houses of Parliament.<sup>11</sup> The article excludes suspension of the rights granted under articles 20 and 21, so that the following rights are non-derogable under India constitution: the rights concerning fair trial, retrospective criminal punishment, double jeopardy, self-incrimination, right to life and personal liberty.

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<sup>11</sup> Id. The Constitution. Article 359(1B)(3).

## Emergency Laws and Regulations in India: Synopsis

### *Introduction*

With a population of approximately 1.25 billion,<sup>12</sup> India has a federal system comprised of 35<sup>13</sup> jurisdictions known as states and the national Government of India at the federal level. With a long trace history,<sup>14</sup> of natural disasters such as the Bengal famine,<sup>15</sup> Orissa Super Cyclone,<sup>16</sup> Gujarat earthquake,<sup>17</sup> Bhopal chemical disaster,<sup>18</sup> recurring floods, the 2004 Indian Ocean tsunami, the 2008 terror attacks and many other disasters.<sup>19</sup> There is "no foyer in the world with space large enough to exhibit the collective pain on the face of India."<sup>20</sup> Aside from natural disasters, India has encountered emergencies relating to internal and external threats on the grounds of the emergency provisions in the Constitution of India: National emergency, State emergency (known as Constitutional Failure or the President's rule) and Financial Emergency.

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<sup>12</sup> India, *The World Fact Book*. <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> (last visited 12/24/2015)

<sup>13</sup> India is a federation composed of 28 states and 7 union territories (<http://india.gov.in/india-glance/profile>) but in June 2, 2014 Telangana will become the 29th state of the Indian Union ([http://www.newindianexpress.com/states/andhra\\_pradesh/Appointed-Day-T-state-to-Come-into-Being-on-June-2/2014/03/05/article2091595.ece](http://www.newindianexpress.com/states/andhra_pradesh/Appointed-Day-T-state-to-Come-into-Being-on-June-2/2014/03/05/article2091595.ece)).

<sup>14</sup> Brennan L. *The Development of the Indian Famine Codes Personalities, Politics and Policies* (1984) [India was one of the first countries to adopt a Famine Code back in 1883, which comprised of a series of government guidelines and regulations on how to respond to famines and food shortages.]

<sup>15</sup> Approx. 1.5-4M people died in Bengal in 1943, according to the famine inquiry commission report Bengal; Ghosh, K.C. *Famines in Bengal 1770-1943* (National Council of Education, Bengal, Calcutta, 2nd ed., 1987); Dyson and Maharatna Dyson, T. and a. Maharatna, *Excess mortality during the Great Bengal Famine: a Re-evaluation*, in *The Indian Economic and Social History Review*, Vol 28, No. 3 (1991)

<sup>16</sup> Orissa Cyclone was the strongest [tropical cyclone](#) ever recorded in the [North Indian Ocean](#), it hit India on October 29, 1999. 15,000 died in the Orissa Super Cyclone. [http://www.preventionweb.net/files/8841\\_Sigma22009e.pdf](http://www.preventionweb.net/files/8841_Sigma22009e.pdf) (last visited 12/24/2015)

<sup>17</sup> 20,000 died, 167,000 injured and nearly 400,000 homes destroyed in Gujarat on January 26, 2001.

[http://earthquake.usgs.gov/earthquakes/eqarchives/year/2001/2001\\_01\\_26.php](http://earthquake.usgs.gov/earthquakes/eqarchives/year/2001/2001_01_26.php) (last visited 12/24/2015)

<sup>18</sup> There were about 3,828 instantaneous deaths in the **Bhopal** gas leak in that considered [to be the world's worst industrial disaster](#). 16,000 more people died from gas-related diseases on the past few weeks after December 2-3, 1984.

<sup>19</sup> See India Natural Disasters database at Université catholique de Louvain. 2009. EM-DAT: The OFDA/CRED International Disaster Database. Brussels, Belgium: Université catholique de Louvain. *India Disaster & Risk Profile. Basic Country Statistics and Indicators* (2014). [www.preventionweb.net/countries/ind/data/](http://www.preventionweb.net/countries/ind/data/)

<sup>20</sup> Kapur Anu, Neeti, Meeta, Deeptima, Roshani, and Debanjali., *Disasters in India: Studies of Grim Reality*(Jaipur: Rawat Publications. 2005).

## 1. The Legislative Framework

Two main pieces of legislation in India directly refer to an emergency situation.<sup>21</sup>:

PART XVIII of the Constitution of India, titled as "Emergency provisions", includes three major emergency provisions: National emergency; State emergency (Failure of Constitutional Machinery); and Financial emergency.<sup>22</sup> "Emergency" is defined as war, external aggression, armed rebellion, failure of constitutional machinery and a threat to financial stability. The Constitution does not specifically refer to natural disasters. India has known three major periods of National emergencies due to threats to its security; In 1962 and 1971 on the basis of "external aggression" and "the Emergency" period in 1975, regarded as a low point in India's history. Furthermore, State emergency provisions have been enforced in many instances which resulted in the dissolution of states' governments due to constitutional failure.<sup>23</sup>

The second piece of legislation which deals with disasters is The National Disaster Management Act of 2005 (NDMA Act). According to the NDMA Act, disaster is defined as "catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes.. which results in a substantial loss of life or human suffering or damage to, and destruction of property, or.. environment."<sup>24</sup> The NDMA Act constitutes the institutional framework for disaster management in India, inter alia, by establishing the National Institute for Disaster Management (NIDM)<sup>25</sup> and the National Disaster Management Authority (NDMA).<sup>26</sup> NIDM aims to

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<sup>21</sup> There are other laws that include emergency related provisions, yet we will not elaborate on each given scope restrictions. For further reading (non-inclusive list) see: The Indian Famine Code, 1883; The Coking Coal Mines (Emergency Provisions) Act, 1971; Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985; The Environment (Protection) Act, 1986; The Public Liability Insurance Act, 1991; The national environment tribunal act, 1995; The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996; Gujarat Disaster Management Act, 2003

<sup>22</sup> FN 6 The Constitution, Articles 352, 356 and 360.

<sup>23</sup> <http://www.slideshare.net/gsmnu007/presidential-rule-in-states-cgi-project>;  
<http://www.jstor.org/discover/10.2307/2643898?uid=3738240&uid=2&uid=4&sid=21104105283687>; <http://www.ejcl.org/81/art81-4.html>

<sup>24</sup> Disaster Management Act 2005, chapter 1, 2(d).

<sup>25</sup> UN resolution 236/44 regarding "The International Decade for Natural Disaster Reduction" (RES 236/44 of December 1989) contributed to the formation of the National Centre for Disaster Management in India (NCDM) in 1995, which was later on upgraded to the National Institute of Disaster management (NIDM) in 2003, under the Ministry of Home Affairs. Historically, NCDM was part of the public administration under The Ministry of Agriculture, Department of Agriculture and Cooperation, yet in an order of October 16, 2003 the government upgraded NCDM and established NIDM under Ministry of Home Affairs. For further read see National Institute of Disaster Management (NIDM) "Genesis and Functions" at <http://nidm.gov.in/genesis.asp>

promote a culture of prevention and preparedness to natural disasters and is responsible for "planning and promoting training and research in the area of disaster management, documentation and development of a national level information base relating to disaster management policies, prevention mechanisms and mitigation measures".<sup>27</sup> The NDMA Act also granted NIDM a statutory status. NDMA, which is headed by the Prime Minister, is responsible for implementing an integrated approach to Disaster Management in India while laying down policies and guidelines to ensure effective response to disasters. These bodies<sup>28</sup> are part of India's well-branched Disaster Risk Management Network<sup>29</sup> which aims to facilitate and activate policies and guidelines<sup>30</sup> for effective Disaster Management.

Below is a non-comprehensive list of laws dealing with emergencies and extreme conditions in India:

Natural disasters	National security	Socio-economic meltdowns
The National Disaster Management Act, 2005	Constitution of India, Provision 352 (National Emergency)	Constitution of India, Provision 360 (Financial Emergency)
The Indian Famine Code, 1883		
The Gujarat Disaster Management Act, 2003 <sup>31</sup>	Armed Forces (Special Powers) Act 1958	
The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985		
The Coking Coal Mines (Emergency Provisions) Act, 1971		
The Environment (Protection) Act, 1986	The National Security Act 1980	
The Public Liability Insurance Act, 1991		
The National Environment Tribunal Act, 1995	The terrorist affected areas	
The Chemical Accidents (Emergency Planning, Preparedness		

<sup>26</sup> The National Disaster Management Authority (NDMA) is established under article 3 of The Disaster Management Act of 2005. see also <http://www.ndma.co.in/>

<sup>27</sup> National Disaster Management Act of 2005 article 42(8)

<sup>28</sup> Another important aspect of the Act is that it constituted the National Disaster Response Funds under article 46 (established by the Government of India in res 32-3/2010-NDM-1 in September 2010), as well as established the National Disaster Response Force (NDRF), a high-tech national disaster response military related force under articles 44, 45 of the Act. For further read see <http://ndrfandcd.gov.in/>

<sup>29</sup> <http://www.hrdp-idrm.in/e5830/>

<sup>30</sup> See national policy on disaster management 2009 (India) and Guidelines on various disasters at: <http://ndma.gov.in/ndma/guidelines.html>

<sup>31</sup> The Act followed a significant earthquake in the state of Gujarat and is regarded in various sources as a fine example for disaster management and is thus stated here. However, as the Act is not on the federal level but deals with one state, it will only be addressed generally.

and Response) Rules, 1996	(Special Courts) Act 1984	
Constitution of India provision 356 (Basket Clause - Failure of Constitutional Machinery also known as the President's Rule)		

## 2. Declaration of a State of Emergency: A Table of Analysis

Situation	Definition of an “emergency”	Who may declare the state of emergency and under what conditions?	Statutes that come into force during emergency	How does a state of emergency end?	Reference (statute and article)
Natural disasters	As mentioned in the preface – the Constitution of India does not deal with emergencies arising from natural disasters. The NDMA Act, which constitutes the institutional framework for natural disasters preparedness and response defines disaster as "catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes.. ". The NDMA Act does not require a declaration of emergency in order to activate the institutional response.				
War, external aggression or armed rebellion	"a grave emergency exists whereby the security of India.. is threatened, whether by <u>war</u> or <u>external aggression</u> or <u>armed rebellion</u> " <sup>32</sup> (underlines are not in the original text). *The President may declare emergency to that effect for the whole of India or any part thereof, even before the actual	The President, subjected to the Cabinet’s written advice and approved by resolutions of both Houses of Parliament ("Lok Sabha" - House of the People, and "Rajya Sabha" – (Council of States) within a month of	Have not been found during research.	An approved proclamation of emergency shall, unless revoked beforehand <sup>35</sup> , cease to operate on	Constitution of India, Article 352.

<sup>32</sup> FN 6, The Contitution, Article 352.

Situation	Definition of an “emergency”	Who may declare the state of emergency and under what conditions?	Statutes that come into force during emergency	How does a state of emergency end?	Reference (statute and article)
	threat occurs. **The provision of National Emergency under Article 352 was amended various times, and the 44th Amendment act is considered a landmark in that it narrowed the Article’s scope in order to avoid misuse of emergency powers previously granted. <sup>33</sup>	the proclamation of Emergency and on the basis of a special majority. <sup>34</sup>		the expiration of a period of six months that may be extended for periods of six months each time. <sup>36</sup>	
Terror events	May be regarded as a State Emergency under article 356 – Failure of Constitutional Machinery (see Punjab insurgency.) <sup>37</sup>				

<sup>35</sup> Id. The Contitution [May be revoked by a subsequent Proclamation 352(2) or given a resolution disapproving it 352(7).]

<sup>33</sup> The Constitution (44th Amendment) Act, 1978. The 44th Amendment came into force on April 30, 1979, and was a direct influence of the internal emergency that was imposed and lasted in India between the years 1975-1977. Some of the alterations were: before the amendment the President could proclaim emergency on the basis of war, external aggression or *internal disturbance*, which was replaced by the term "armed rebellion" due to the danger in the phrase being too vague; before the amendment the President could proclaim Emergency on the oral advice of the Prime Minister whereas after the amendment a requirement of a written Cabinet advice was established; Another safeguard provided in the 44th Amendment is the need for Parliament's special majority to approve the proclamation of emergency.

<sup>34</sup> Id. The Contitution, Article 352(6).

<sup>36</sup> Id. Article 352(5).

<sup>37</sup> In the State of Punjab "President's Rule" has been declared several times throughout the 80' due to, *inter alia*, terror activities. For further read see: Subhash Chander Arora, *President's Rule in Indian States: A Study of Punjab* (New Delhi : Mittal Publications, 1990).

Situation	Definition of an “emergency”	Who may declare the state of emergency and under what conditions?	Statutes that come into force during emergency	How does a state of emergency end?	Reference (statute and article)
Socio-economic meltdowns	"satisfied that a situation has arisen that financial stability and credit of India or any part thereof is threatened." <sup>38</sup>	The President, Proclamation is subjected to the approval of both houses of parliament within two months. <sup>39</sup>	Have not been found during research.	Within 2 months if not approved by parliament <sup>40</sup> ; once approved till revoked by the President.	Constitution of India, Article 360.
Cyber	No specific legislation dealing with cyber threats has been found, however, it seems that in some cases the articles in the Constitution dealing with the three types of emergencies can be applied. <sup>41</sup>				
Other - Failure of Constitutional Machinery (also known as the President’s Rule)	"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, Proclamation is subjected to the approval of both houses of parliament within two months <sup>42</sup>	Have not been found during research	An approved proclamation of emergency shall expire within six months. May be extended by a presidential resolution approved by both houses of parliament for additional six months each time and up to no more than three years <sup>43</sup>	Constitution of India, Article 356 <sup>44</sup>

<sup>38</sup> FN 6, The Constitution, Article 360.

<sup>39</sup> Id. The Constitution [Whereas declaring National Emergency under Article 352 requires a special majority, it seems that Socio-economic emergency under article 360 does not.]

<sup>40</sup> Id. Article 360 (2)(c).

<sup>41</sup> It should be noted that an “Indian Computer Emergency Response Team” (CERT), a national nodal agency responsible for responding to cyber security threats, exists (see:<http://www.cert-in.org.in>).

<sup>42</sup> Id. Article 356(3) [similarly to article 360 concerning financial emergency, does not address special majority.

<sup>43</sup> Id. Article 356(4) [Note that with respect to the State of Punjab, the reference has been amendment in the Constitution and construed as a five years with regard to the proclamation issued on May 1987, 68 amendment of 1991]

<sup>44</sup> Whereas the elected state government is suspended and administration is conducted by the Governor of the state (which is appointed by the president), the

### 3. Legal Powers

#### (Legal powers during emergency)

Situation	Powers	who is the power conferred to	power exercised vis-a-vis	Conditions to be met when exercising the power	Article in the Constitution
Earthquake	Under the National Disaster Management Act, 2005 each district is responsible for disaster preparedness, and mitigation activities.  Gujarat Disaster Management Act (2003) mandates every citizen to help state administration in an emergency operation. <sup>45</sup>				NA
Fire					
Epidemic					
Flood					
Tsunami					
Storms (tornado, hurricane)					
War, external aggression or armed rebellion	<ul style="list-style-type: none"> <li>• Legislative powers<sup>46</sup> - Parliament is granted legislative powers with respect to any matter in the relevant State</li> <li>• Executive powers<sup>47</sup> - State Government is brought under the</li> </ul>	<ul style="list-style-type: none"> <li>• Parliament</li> </ul>		<ul style="list-style-type: none"> <li>• a Proclamation of Emergency is in operation</li> </ul>	<ul style="list-style-type: none"> <li>• Article 250 and Article 353(b)</li> </ul>

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effective government is run by the Union. While dealing with the balance of power between state and central governments, in S.R. Bommai vs Union the Indian Supreme Court laid down guidelines for executing Article 356 in order to avoid its misuse. *Inter alia*, it stated that the powers granted under the Article are not absolute and are subjected to judicial scrutiny. See S.R. Bommai vs Union Of India {1994} AIR 1918, 1994 SCC (3) 1.]

<sup>45</sup> the Gujarat Disaster Management Act, 2003, Section 31.

<sup>46</sup> FN 6, The Constitution, Articles 250 and 353(b).

<sup>47</sup> Article 353(a)

Situation	Powers	who is the power conferred to	power exercised vis-a-vis	Conditions to be met when exercising the power	Article in the Constitution
	<p>effective control of the Union</p> <ul style="list-style-type: none"> <li>• Distribution of revenues<sup>48</sup> - provisions of articles 268 to 279, which relate to taxation, are subject to exceptions as seems fit by the President.</li> </ul>	<ul style="list-style-type: none"> <li>• The Union</li> <li>• President</li> </ul>		<ul style="list-style-type: none"> <li>• a Proclamation of Emergency is in operation</li> <li>• a Proclamation of Emergency is in operation and the order must be laid before each House of Parliament</li> </ul>	<ul style="list-style-type: none"> <li>• Article 353(a)</li> <li>• Article 354</li> </ul>
Terror events	Not found in research				
Socio-economic meltdowns	<ul style="list-style-type: none"> <li>• Executive powers<sup>49</sup> - Powers are vested in the President to instruct and give orders to States on all financial matters, including the decrease of salaries of civil servants</li> <li>• Legislative power - direct the government that all financial and Money Bills passed by legislature are reserved for the President's consideration<sup>50</sup></li> </ul>	<ul style="list-style-type: none"> <li>• President</li> <li>• President</li> </ul>			<ul style="list-style-type: none"> <li>• Article 360</li> <li>• Article 360 (4)(a)(2)</li> </ul>

<sup>48</sup> Article 354

<sup>49</sup> Article 360

<sup>50</sup> Id. The Constitution, Article 360 (4)(a)(2).

Situation	Powers	who is the power conferred to	power exercised vis-a-vis	Conditions to be met when exercising the power	Article in the Constitution
Other – Failure of Constitutional Machinery	<ul style="list-style-type: none"> <li>• Legislative powers<sup>51</sup> - State legislative functions can be assumed by the Parliament or the President</li> <li>• Executive powers<sup>52</sup> - President may take over all administrative and executive powers of the State.</li> </ul>	<ul style="list-style-type: none"> <li>• Parliament</li> <li>• President</li> </ul>		Proclamation of failure of constitutional machinery, by the President.	<ul style="list-style-type: none"> <li>• Article 356(1)(a) and 357</li> <li>• Article 356<sup>53</sup></li> </ul>
Other – Basket Clause <sup>54</sup>	Duty of the Union to protect States against external aggression and internal disturbance.				• Article 355

<sup>51</sup> Id. The Constitution, Article 356(1)(a) and 357.

<sup>52</sup> Id. The Constitution, Article 356.

<sup>53</sup> It should be noted that through the years several commissions of the Indian government dealt with problems arising from the possible misuse of Article 356. The Sarkaria Commission and the National Commission to Review the Working of the Constitution (NCRWC) "have recommended various measures to utilize Article 356 in preserving the balance between the Union and the States". The Commission on Centre-State Relations' report (2010) "recommends and reiterates these suggestions [...]"  
[in addition] The Report seeks to provide for legal structure, constitutional or otherwise, which empowers the Centre to impose "local emergency" within the territory of a state in cases of widespread violence within such territory which could be communal, separatist, terrorism related. Etc., or a large scale natural disaster and which in the opinion of the (Union, a) is beyond the means of the State to control and/or;b) the state is unwilling to control or react to". Moreover, "The Supreme court has [...] created safeguards with regard to the utilisation of Article 356. The Commission [on Centre-State Relations] would recommend such safeguards to be adopted through constitutional amendments [...]"  
In this regard, safeguards suggested by the NCRWC relying on various suggestions of the Sarkaria Commission [...] were also applauded by the Supreme Court in the *S.R Bommai* case, and it can be argued that the same are already part of the law of the land".  
COMMISSION ON CENTRE-STATE RELATIONS REPORT volume-II, Constitutional Governance and the Management of Centre-State Relations pp. 92, 108-109 (2010) <http://interstatecouncil.nic.in/downloads/volume2.pdf> (last visted 12/24/2015)

<sup>54</sup> Id. The Constitution, article 355

**(Legal powers before emergency)**

Situation	Powers	who is the power conferred to	power exercised vis-a-vis	Conditions to be met when exercising the power	Situation
Earthquake	Under the National Disaster Management Act, 2005 each district should have a disaster prevention and management plan, a district disaster management committee, training and drills. <sup>55</sup>				NA
Fire					
Epidemic					
Flood					
Tsunami					
Storms (tornado, hurricane)					
War, external aggression or armed rebellion	Gujarat Disaster Management Act (2003) mandates every citizen to help state administration in prevention. <sup>56</sup>				
	Declaration of emergency may be ordered even before the actual threat occurs <sup>57</sup> so that all powers granted during an emergency are relevant as well (see table "during" above). Such proclamation can be made before the actual occurrence of war or of any such aggression or rebellion "if the President is satisfied that there is imminent danger				Article 352

<sup>55</sup> NDMA rules and responsibilities, at <http://ndma.gov.in/ndma/rolesrespons.html>

<sup>56</sup> FN 48, Gujarat Disaster Management Act, Section 31 .

<sup>57</sup> FN 6, The Constitution, Article 352.

Situation	Powers	who is the power conferred to	power exercised vis-a-vis	Conditions to be met when exercising the power	Situation
	thereof".				

**(Legal powers after emergency)**

Situation	Powers	who is the power conferred to	power exercised vis-à-vis	Conditions to be met when exercising the power	Situation
Earthquake	<ul style="list-style-type: none"> <li>• Gujarat Disaster Management Act (2003) mandates every citizen to help state administration in recovery</li> <li>• Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 allowed the Government of India to act as the legal representative for victims of the disaster, and was in use for processing of claims by victims and settlement agreements.</li> </ul>				Section 31 of the Gujarat Disaster Management Act, 2003 Bhopal Gas Leak Disaster (Processing of Claims) Act 1985.
Fire					
Epidemic					
Flood	<ul style="list-style-type: none"> <li>• The National Disaster Management Act of 2005 (NDMA Act) established the State Disaster Response Fund (SDRF) and the National Disaster Response Fund (SDRF) that should be "applied towards meeting the expenses for emergency response, relief and rehabilitation"</li> <li>• The Civil Liability for Nuclear Damage Act, 2010 promotes compensation to victims of nuclear incidents<sup>58</sup></li> </ul>				Article 46 of the National Disaster Management Act of 2005 The Civil Liability for Nuclear Damage Act, 2010.
Tsunami					
Storms (tornado, hurricane)					
War, external aggression or armed rebellion	Judicial review – President's proclamation of national emergency is subjected to judicial review on the grounds of mala fide. <sup>59</sup>	Judiciary branch	Note that until the 44th amendment, judicial scrutiny was excluded (in a landmark case regarding detention orders that were allegedly passed mala fide, the Supreme Court held that the judiciary could not be petitioned for in the event of national emergency under Article 352 of the	a Proclamation of Emergency is in operation in accordance with article 352 of the Constitution.	Article 352 of the Constitution

<sup>58</sup> [http://lawmin.nic.in/ld/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT,2010.%20\(38%20OF%202010\).pdf](http://lawmin.nic.in/ld/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT,2010.%20(38%20OF%202010).pdf)

<sup>59</sup> In *Minerva Mills*, the court held that there is no bar to judicial review of the validity of the proclamation of emergency issued under 352, yet judicial review is limited only to examining whether the limitations conferred by the constitution have been observed or not (See: *Minerva Mills vs Union of India* AIR 1980)

Situation	Powers	who is the power conferred to	power exercised vis-à-vis	Conditions to be met when exercising the power	Situation
			Constitution. <sup>60)</sup>		
Terror events	Not found in research.				
Socio-economic meltdowns					
Cyber attacks					
Other – Failure of Constitutional Machinery	Judicial review	Judiciary branch	The powers vested in the President according to Article 356 of the Constitution are not absolute and subjected to judicial review, inter alia, on the grounds of mala fide. <sup>61</sup>		Constitution of India, Article 356
Other – Right to Information Act, 2005	Allows access to records, documents, e-mails, circulars, and any other information held by a public authority and by that gives the people the right to scrutinize the performance of public officials and hold them accountable for actions that they professedly take on behalf of the people.				

<sup>60</sup> *A.D.M. vs. Shivakant Shukla*, 1976 AIR 1207, 1976 SCR 172.

<sup>61</sup> *S.R. Bommai and others vs Union of India*, 1994; *State of Rajasthan vs Union of India* AIR 1977

## 4. Rights in a State of Emergency

India's history shows that "times of grave national emergency demand the grant of special powers to the Executive" so that even arbitrary arrest and imprisonment were at times "legalized by Act of Parliament"<sup>62</sup>. One example that vividly illustrates that would be the total number of detainees that were arbitrarily detained during "the Emergency" period during 1975-1977 – without the ability to petition to courts<sup>63</sup> – was approximately 100,000<sup>64</sup>. Currently, these are the provisions that relate to suspension of human rights during emergency versus rights that are non-derogable:

Article 358 states that fundamental rights under article 19<sup>65</sup> are suspended while National Emergency is declared and in operation (according to which the security of India is threatened due to war or external aggression<sup>66</sup>). In such an emergency, "the power of the State to make any law or to take any executive action" shall not be restricted by the protected rights in Article 19, as long as such law or action, which transgresses upon freedoms granted by Article 19 are in relation to the emergency. Furthermore, any such law shall cease to have effect once the proclamation ceases to operate<sup>67</sup>.

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<sup>62</sup> E.C.S. Wade and Godfrey Phillips, *Constitutional Law*, 8th Edition, Chapter 48, pp. 717, 718.

<sup>63</sup> "The Constitution is the mandate. The Constitution is the rule of law ... The suspension of right to enforce fundamental right has the effect that the emergency provisions in Part XVIII are by themselves the rule of law during times of emergency. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre-Constitution or post-Constitution Rule of Law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the times of emergency" *A.D.M. Jabalpur v. Shivakant Shukla*, A.I.R. 1976 S.C. 1207 ; also *Union of India v. Bhanudas*, 1977 AIR 1027, 1977 SCR (2) 719 where the Court held that the Presidential orders suspending fundamental rights "impose blanket bans on any and every judicial enquiry or investigation into the validity of an order depriving a person of his personal liberty".

<sup>64</sup> Annalal Dhar, preventive detention under Indian Constitution, 144-145 (1986).

<sup>65</sup> FN 6, The Constitution, Part III (articles 12 to 35) [grants protections to fundamental rights. Article 19 of the Constitution protects the rights of freedom of speech; assemble; form associations; move freely throughout the territory of India; reside and settle in any part of India and to practice any profession, or to carry on any occupation.]

<sup>66</sup> Id. Article 358 [refraining from referring to article 352 explicitly, yet does refer to "proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression". When comparing article 352 to 358 we can see that the grounds of "armed rebellion" for declaring national emergency does *not* fall under the right to suspend fundamental right within the scope of article 358 (omitting "armed rebellion" under 358 is one of the changes made in the 44th Amendment, see footnote 21).]

<sup>67</sup> Back in 1978 in the case of Madan Mohan Pathak the Supreme Court held that the fundamental rights granted in articles 14 to 19 are not suspended per-se during emergencies but merely their operation is, and that once the emergency is over, rights will revive. *Madan Mohan Pathak vs Union Of India & Ors. Etc*, 1978 AIR 803, 1978 SCR (3) 334.

Article 359 of the Constitution provides that when a proclamation of emergency has been activated, an enforcement of any fundamental right may be suspended by the issue of a Presidential Order, which may extend to the whole or any part of India, for as long as such action is in relation to the emergency and given that it is laid before both Houses of Parliament<sup>68</sup>. The article excludes suspension of the rights granted under articles 20 and 21 of the Constitution - the rights concerning fair trial, retrospective criminal punishment, double jeopardy, self-incrimination<sup>69</sup>, right to life and personal liberty<sup>70</sup>. The 44th Amendment<sup>71</sup> amended the Constitution so that these rights are non-derogable even under a declared state of emergency.

It seems that the above mentioned articles include an important distinction in terms of judicial review: Given that the suspension of the rights mentioned in Article 19 is immediate during emergency under article 358 (war or external aggression), a legislative or executive act under article 358 cannot be challenged in court even once the emergency is over. On the other hand, article 359 (Proclamation of Emergency), as it does not explicitly suspend any fundamental rights (but grants the President with the power to issue an order that suspends the right to appeal to court for enforcement of a right) means that an action under Article 359 can be challenged after the suspension is over<sup>72</sup>. Please note that in addition to the constitutional articles, there is other legislation relevant to human rights (yet which does not specifically relate to "Emergency" in its pure sense as discussed throughout this paper): The Armed Forces Special Powers Act 1958 permits the Army to arrest suspects and conduct searches in "disturbed areas"; The National Security Act 1980 authorizes security forces to arrest and detain without warrant; The terrorist affected areas (special courts) Act, 1984; The Terrorist and Disruptive Activities (Prevention) Act, 1985 have provided the security forces with powers of search and seizure.

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<sup>68</sup> FN 66, The Constitution, Article 359 (1B).

<sup>69</sup> Id. The Constitution, Article 20.

<sup>70</sup> Id. Article 21.

<sup>71</sup> See FN 33

<sup>72</sup> For such an interpretation by the Supreme Court see *Makhan Singh vs State Of Punjab(And Connected)* 1964 AIR 381, 1964 SCR (4) 797.