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# PROCLAMATION OF EMERGENCY VIS-À-VIS INFRINGEMENT OF THE FUNDAMENTAL RIGHTS: AN INDIAN PERSPECTIVE

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## ABSTRACT

The Constitution of India provides the provisions in Part III which guarantees fundamental rights to the peoples. Idea of fundamental rights was taken from the United States of America. It is given in Articles 12 to 35 of the Indian Constitution. Fundamental Rights were very much essential to protect the rights and liberties of the people against the infringement of those rights and liberties by the government. So, these fundamental rights act as fundamental restrictions on the powers of the State. This can be inferred from article 13(2) which lays down that if any law to be made that should not violate any provisions of Part III of this Constitution and it is so then it will be void to the extent it contravenes such fundamental rights. Despite that, these fundamental rights are not absolute rights and having certain restrictions. Sometimes when there is a situation of emergency in which state's security is at stake then it is required to have enough power with the central government to deal with such urgency. In such situation that is when there is proclamation of emergency as per Article 352,<sup>1</sup> imposed by the President of India at the recommendation of the Union Cabinet under Article 359 of the Constitution of India, these fundamental rights can be suspended. Part XVIII of the constitution is given to draw a balance between restrictions on individuals and individual's rights as such restrictions can't be to the extent that it has taken the individual's basic rights and that is to be remain intact within them.

Since last 50 years, on three occasions proclamation of emergency have been declared firstly in 1962 when Chinese invaded on Indian territories, then in 1971 when there is conflict with Pakistan; and lastly in 1975 on the ground of internal disturbances (now this ground is no more applicable under Article 352).

This research analyses what happens during emergency and how the normal Constitutional fabric and functioning of the government of normal time gets changed; who can be made responsible or liable for its misuse; and the

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<sup>1</sup> INDIA CONST. art. 352.

attitude of judiciary. It will also evaluate the content and extent of the provisions of the fundamental rights in the light of the operation of these provisions during the proclamation of emergency and to assess their impact on constitutional democracy and individual liberty. Moreover, it will find out various loopholes in the existing statutory provisions relating to emergency provisions in India vis-à-vis fundamental rights.

## **1. EMERGENCY PROVISIONS- HISTORICAL BACKGROUND**

### **1.1 Its origin and evolution**

Because of the British colonial experience provisions relating to emergency incorporated into the Indian Constitution. During British rule emergency powers were used to suppress and to control Indians. The Government of India Act, 1935 was the basis of the Article 352 for proclamation of emergency. According to the provisions of this Act, Britishers used to proclaim an emergency in case there was any threat to the security of the colony, including civil unrest and external aggression. The Act allowed the central government to assume significant powers during an emergency, including suspending civil liberties.

While debates in the constituent assembly (1946-49) was going on, there framers realized the need for an emergency provision to cater situations of crisis in the nation in the light of then India's partition and the world war II situation so as to maintain balance it with the protection of individual's fundamental rights. Initially when the Constitution was drafted there are 3 grounds in which proclamation of emergency can be declared: war, external aggression and internal disturbance.

However, later on term 'internal disturbance' was considered to be vague as it was broadly interpreted and was being misused by the authority. This can be evident from the National Emergency declared in 1975 by the then prime minister Indira Gandhi on the ground of 'internal disturbance' which lasted from June 25, 1975 to March 21, 1977 followed by the political instability. During this period, civil liberties were suspended, the press was censored, and political opponents were jailed. Then after the end of emergency by the 44<sup>th</sup> Constitutional Amendment reform has been made under Article 352 and the term 'internal disturbance' has been substituted by the term 'armed rebellion' and there by narrowed the grounds of proclamation of emergency.

The subsequent provisions in Part XVIII (9 Articles) find their origin partly in the U.S. habeas corpus suspension clause.

### **1.2 Proclamation of emergency in 1962**

For the 1st time proclamation of emergency was declared in 1962 under Article 352 on the ground of threat of war on the Chinese attack over the North-East Frontier Area (NEFA). Because of which Article 19 was suspended and empowered the state to make any laws in contravention of rights. Thereupon President under Article 359 passed an order because of which rights guaranteed under Articles 14, 21 and 22 were suspended.

### **1.3 Proclamation of emergencies in 1971 and 1975**

There was again proclamation of emergency declared under Article 352 on account of conflict with Pakistan on the ground of threat of war. Even when this was in existence another emergency was proclaimed on the ground of internal disturbance in 1975. Then in 1977 these emergencies together came to an end. The President in 1975 in furtherance of such proclamation made an order under Article 359 which provides right to move any court for enforcing the rights under Articles 14, 21 and 22 and all the pending proceedings to enforce such rights to be suspended till such proclamations.<sup>2</sup>

One of the important cases before the hon'ble Supreme Court was *A.D.M. Jabalpur v. Shivkant Shukla*<sup>3</sup>, popularly known as 'Habeas Corpus Case' whose minority view has been accepted and majority has been rejected in the subsequent judgments as it was observed that no person had the right to approach either the High Court or the Supreme Court for any writ.

### **1.4 Subsequent Developments**

With the end of emergency in 1977 and with the coming of new government by elections at centre, major amendments were done by mainly 42nd and 44th Constitutional Amendments with an objective to avoid abuse of power as had been done in some past years.

One of the major changes by that is that under Articles 359 (1) and now under this Article the President was now permitted to suspend the enforcement of any fundamental rights enumerated under Part III except rights in Articles 20 and 21. Thus, right under Article 21 can't be suspended during proclamation of emergency except by a 'procedure established by law'. Moreover, in the further case of *Maneka Gandhi v Union of India*,<sup>4</sup> it was observed that such 'procedure' under Article 21 must be just, fair and reasonable.

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<sup>2</sup> Shyamkrishna Balganes, Fundamental Rights During a Proclamation of Emergency: The Indian Experience, 12 NLSIR 29 (2000), available at <https://repository.nls.ac.in/nlsir> (last visited on September 21, 2024).

<sup>3</sup> AIR 1976 SC 1207: (1976) 2 SCC 521.

<sup>4</sup> AIR 1978 SC 597: (1978) 1 SCC 248.

## 2. TYPES OF EMERGENCIES IN THE INDIAN CONSTITUTION- A BRIEF STUDY

### 2.1 Proclamation of emergency

Article 352 deals with proclamation of emergency. It is declared on the ground of war, external aggression, or armed rebellion. During this period certain fundamental rights can be suspended including Article 19. Under Articles 358 and 359 the President has the authority to suspend the enforcement of these rights which are affecting civil liberties of individuals very badly. This had been invoked thrice in time.

### 2.2 Failure of constitutional machinery in State

Mainly Article 356 deals with it and also known by the name 'President's Rule.' This is invoked when the governance in a state cannot be working out according to the provisions of the Constitution. Unlike Article 352 it does not affect the fundamental rights and by this central government does the functions of the State government. This provision has been invoked many times.

### 2.3 Financial Emergency

Article 360 deals with the financial emergency, in which there is a threat to the financial stability of the nation. This provision has never been invoked till now.

## 3. INFRINGEMENT OF FUNDAMENTAL RIGHTS DURING PROCLAMATION OF EMERGENCY

### 3.1. Provisions of proclamation of emergency vis-à-vis fundamental rights

The proclamation of emergency under Article 352 of the Indian Constitution significantly impacts the exercise of fundamental rights. The emergency provisions allow the executive to suspend or limit the operation of certain fundamental rights in order to maintain national security during times of war, external aggression, or armed rebellion. There are basically two provisions in Part XVIII of the Constitution of India which are Articles 358 and 359, dealing with status of fundamental rights in the meanwhile of a proclamation of emergency under Article 352. In the case *Makhan Singh v. State of Punjab*<sup>5</sup>, for the first time the hon'ble Supreme Court specify the difference between rights under articles 358 and 359 of the Constitution of India.

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<sup>5</sup> AIR 1964 SC 381.

Under Article 358, at the moment there is declaration of proclamation of emergency, rights under Article 19 that is, right of freedom of speech and expression get automatically suspended and wide powers are given to the legislature as well as the executive to that extent till the time such proclamation exists.

Article 359 allows the President to suspend the right to move any court for the enforcement of fundamental rights (except for Articles 20 and 21 after the 44th Amendment) during the period of the emergency by issuing order with regard to that.

### **3.2. Effect of proclamation of emergency on the fundamental rights:**

1. Central legislations will overrule state legislation and the Centre is empowered to rule and legislate on the state subjects (under List II of 7th Schedule).
2. As per Article 358, right under article 19 will be suspended.
3. As per Article 359, during such proclamation the President may by order suspend the enforcement of any fundamental rights under Part III except Article 21 and 22.

## **4. CRITICISM, SUGGESTIONS AND CONCLUSION**

The proclamation of emergency under Article 352 has been extremely criticized for the reason that by this fundamental right under Article 19 of the Constitution of India is automatically suspended as per Article 359 and also the enforcement of any fundamental right (except rights under Article 20 and 21) guaranteed under Part III in any court is also suspended during such period upon the issue of order by the President. Moreover, historically we also witnessed the situation of its misuse as happened in 1975 Emergency. At such proclamation there was also lack of judicial independence as this can be inferred from the hon'ble Supreme Court's ruling in the ADM Jabalpur case (1976), which upheld the suspension of habeas corpus during the Emergency, is considered one of the darkest moments in the judiciary's history. Even though the remedy of judicial review has been restored by 44<sup>th</sup> Constitutional Amendment, there remains the possibility that courts could be pressured for favouring the executive during such proclamation under Article 352.

To avoid the reoccurrence of misuse of emergency powers and to protect the individual's fundamental rights there is need of further tightening of the grounds of proclamation of emergency under Article 352. Also judiciary has to be strengthened so as to ensure there is independence of judiciary. Moreover, there should be transparency in the working of the Parliament while proclamation of emergency under this provision.

Even after this we can't deny the fact that proclamation of emergency under Article 352 proved to be an essential tool to safeguard national security and stability at the time when there is a threat to its security and integrity. After the 44th Constitutional Amendment there was a major change in the provision in order to prevent its misuse.