

When Fundamental Rights are Suspended ?

since ADM jabalpur till today, the situation with reference to the position of FR's during emergency has seen a complete change, this article will the same issue....

Title of the topic basically talks about two main and important factors of Indian constitution of India i.e. "Emergency provision & fundamental rights"

When the Constitution of India was being drafted, India was passing through a period of Stress and strain. Partition of the country, communal riots and the problem concerning the Merger of princely states including Kashmir. Thus, the Constitution-makers thought to Equip the Central Government with the necessary authority, so that, in the hour of emergency, When the security and stability of the country is threatened by internal and external threats. Therefore, some emergency provisions were made in Constitution to safeguard and protect the security, integrity and stability of the country and effective functioning of State Governments.

Keeping in view the above stated points constitution makers inserted three kinds of emergency.

Emergency provision falls in PART-XVIII of the constitution of india from art.352 to art. 360

1. National emergency (Article 352 of the constitution of india)
2. State emergency (Article 356 of the constitution of india)
3. Financial emergency (Article 360 of the constitution of india)

Before moving to other points first we shall look into emergency provision and elaborate them.

NATIONAL EMERGENCY

As it is very clear from the opening words of the above stated heading,national emergency deals with constitutional provisions to be applied,whenever there are inbalance in the society in the whole country and not in a particular or specific region or state.

1.1:-Art. 352 reads that-

352. Proclamation of Emergency. —(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.

Explanation-A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may 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 thereof.

Provisions have been made in the Constitution for dealing with extraordinary situations that may threaten the peace, security, stability and governance of the country or a part thereof.

The Constitution of India has provided for imposition of emergency caused by war, external aggression or internal rebellion. This is described as the National Emergency. This type of emergency can be declared by the President of India if he is satisfied that the situation is very grave and the security of India or any part thereof is threatened or is likely to be threatened either, by war or external aggression by armed rebellion within the country. The President can issue such a proclamation even on the ground of threat of war or aggression. According to the 44th Amendment of the Constitution, the President can declare such an emergency only if the Cabinet recommends in writing to do so.

Role of 44th amendment we will be discussing in later sub heads.

As far as proclamation of national emergency is concerned, there are certain basic points which are stated in previous statements. Those are-

that the security of India or any part of the territory thereof is threatened - this statement talks about the situation when either the country wholly or any part of the country, but that would not be considered as state emergency, also this kind of proclamation may be made before the actual occurrence of such war, external aggression or armed rebellion.

by war or by external aggression-the opening words itself are of explanatory nature,so they don't need to be explained much. when ever other objects (not within the Indian territory) try to create problems for India and its citizens through war or aggression.

armed rebellion within the country-the word "armed rebellion" was not there in the constitutional provisions from the very beginning.before 1978 an emergency could be declared because of "war,external aggression or internal disturbance", that was too vague and broad in sense.the 44th constitutional amendment substituted the word "armed rebellion" for internal disturbance.

Supreme court explained in one of the case,the expression "internal disturbance "has a wider connotation than "armed rebellion" in the sense that armed rebellion is likely to pose a threat to the security of the country or a part thereof, while internal disturbance, though serious in nature, would not pose a threat to the security of the country or a part thereof.

The intention underlying the substitution of the words internal disturbance by "armed rebellion "is to limit the invocation of art. 352 only to more serious situations where there is a threat to the security of the country.

1.2:- procedure of proclaiming emergency-

As I have already said that such a proclamation can be made by the president of the country,but there are some provision for that too, the President can declare such an emergency only if the Cabinet recommends in writing to do so. Such a proclamation of emergency has to be approved by both the Houses of Parliament by absolute majority of the total membership of the Houses as well as 2/3 majority of members present and voting within one month, otherwise the proclamation ceases to operate.

In case the Lok Sabha stands dissolved at the time of proclamation of emergency or is not in session, it has to be approved by the Rajya Sabha within one month and later on by the Lok Sabha also within one month of the start of its next session. Once approved by the Parliament, the emergency remains in force for a period of six months from the date of proclamation. In case it is to be extended beyond six months, another prior resolution has to be passed by the Parliament. In this way, such emergency continues indefinitely.

In the case of *Minerva Mills Ltd. vs Union of India* held that there is no bar to judicial review of the validity of the proclamation of emergency issued by the president under 352(1). However, court's power is limited only to examining whether the limitations conferred by the constitution have been observed or not. It can check if the satisfaction of the president is valid or not. If the satisfaction is based on mala fide or absurd or irrelevant grounds, it is no satisfaction at all.

1.3:- procedure of revoking emergency-

If the situation improves the emergency can be revoked by another proclamation by the President of India.

The 44th Amendment of the Constitution provides that ten per cent or more members of the Lok Sabha can requisition a meeting of the Lok Sabha and in that meeting, it can disapprove or revoke the emergency by a simple majority. In such a case emergency will immediately become inoperative.

1.4:-Effects of national emergency-

The declaration of National Emergency has effects both on the rights of individuals and the autonomy of the states in the following manner :

The most significant effect is that the federal form of the Constitution changes into unitary. The authority of the Centre increases and the Parliament assumes the power to make laws for the entire country or any part thereof, even in respect of subjects mentioned in the State List.

The President of India can issue directions to the states as to the manner in which the executive power of the states is to be exercised.

During period, the Lok Sabha can extend tenure by a period of 1 year at a time. But the same cant be extended beyond 6 months after the proclamation ceases to operate. The tenure of State Assemblies can also be extended in the same manner.

During emergency, the President is empowered to modify the provisions regarding distribution of revenues between the Union and the States.

The Fundamental Rights under Article 19 are automatically suspended and this suspension continues till the end of the emergency.

But according to the 44th Amendment, Freedoms listed in Article 19 can be suspended only in case of proclamation on the ground of war or external aggression. From the above discussion, it becomes quite clear that emergency not only suspends the autonomy of the States but also converts the federal structure of India into a unitary one. Still it is considered necessary as it equips the Union Government with vast powers to cope up with the abnormal situations.

EFFECT OF NATIONAL EMERGENCY FALLS IN ART.353 OF THE CONSTITUTION OF INDIA.

STATE EMERGENCY

2.1:-Art. 356 reads that-

356. Provisions in case of failure of constitutional machinery in States.—(1) If the President, on receipt of a report from the Governor of a 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 any body 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 any body or authority in the State:

Provided that nothing in this clause shall authorise 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.

Reason being-

It is the duty of the Union Government to ensure that governance of a State is carried on in accordance with the provisions of the Constitution. Under Article 356, the President may issue a proclamation to impose emergency in a state if he is satisfied on receipt of a report from the Governor of the State, or otherwise, that a situation has arisen under which the Government of the State cannot be carried on smoothly. In such a situation, proclamation of emergency by the President is called 'proclamation on account of the failure (or breakdown) of constitutional machinery.' In popular language it is called the President's Rule.

2.2:- procedure of proclaiming state emergency-

Like National Emergency, such a proclamation must also be placed before both the Houses

of Parliament for approval. In this case approval must be given within two months, otherwise the proclamation ceases to operate. If approved by the Parliament, the proclamation remains valid for six months at a time. It can be extended for another six months but not beyond one year. However, emergency in a State can be extended beyond one year if

(a) a National Emergency is already in operation; or if

(b) the Election Commission certifies that the election to the State Assembly cannot be held.

2.3:- procedure of revoking state emergency-

Any such Proclamation may be revoked by a subsequent Proclamation.

Every Proclamation shall be laid before each House of Parliament and shall, 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.

2.4:- effect of state emergency-

The declaration of emergency due to the breakdown of Constitutional machinery in a State has the following effects:

The President can assume to himself all or any of the functions of the State Government or he may vest all or any of those functions with the Governor or any other executive authority.

The President may dissolve the State Legislative Assembly or put it under suspension. He may authorise the Parliament to make laws on behalf of the State Legislature.

The President can make any other incidental or consequential provision necessary to give effect to the object of proclamation.

2.5:-criticism of president's rule-

The way President's Rule was imposed on various occasions has raised many questions. At times the situation really demanded it. But at other times, President's Rule was imposed purely on political grounds to topple the ministry formed by a party different from the one at the Centre, even if that particular party enjoyed majority in the Legislative Assembly. Suspending or dissolving assemblies and not giving a chance to the other political parties to form governments in states has been due to partisan consideration of the Union Government, for which Article 356 has been clearly misused.

In view of the above facts, Article 356 has become very controversial. In spite of the safeguards provided by the 44th Amendment Act, this provision has been alleged to be misused by the Union Government. That is why, there is a demand either for its deletion or making provision in the Constitution to restrict the misuse of this Article. The Sarkaria Commission which was appointed to review the Centre-State relations also recommended that Article 356 should be used only as a last resort. The Commission also suggested that the State Legislative Assembly should not be dissolved unless the proclamation is

approved by the Parliament. It further suggested that all possibilities of forming an alternative government should be fully explored before the Centre imposes emergency in a State on grounds of breakdown of Constitutional machinery. The Supreme Court held in the Bommai case that the Assembly may not be dissolved till the Proclamation is approved by the Parliament. On a few occasions such as when Gujral Government recommended use of Article 356 in Uttar Pradesh, the President returned the recommendation for reconsideration. The Union Government took the hint and dropped the proposal.

FINANCIAL EMERGENCY

3.1:- Art. 360 reads that-

360. Provisions as to financial emergency.—If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

The third type of Emergency is Financial Emergency provided under Article 360. It provides that if the President is satisfied that the financial stability or credit of India or any of its part is in danger, he may declare a state of Financial Emergency. Like the other two types of emergencies, it has also to be approved by the Parliament. It must be approved by both Houses of Parliament within two months. Financial Emergency can operate as long as the situation demands and may be revoked by a subsequent proclamation.

Art 360 provides that if the president is satisfied that a situation has arisen whereby the financial security of India or the credit of India or of any part of India is threatened, he may make a declaration to that effect. Under such situation, the executive and legislative powers will go to the centre. This article has never been invoked.

A Proclamation issued under Art. 360—

(a) may be revoked or varied by a subsequent Proclamation

(b) shall be laid before each House of Parliament

(c) shall 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.

IN INDIA FINANCIAL EMERGENCY HAS NEVER TAKEN PLACE,SO REGARDING THIS MATTER WE DON'T HAVE SUFFICIENT INFORMATION ,BACause NO DISPUTE EVER AROSE OR ANY CASE LAW EVER CAME IN THE LIGHT.

3.2:- Effects of Financial Emergency-

The proclamation of Financial Emergency may have the following consequences:

- (a) The Union Government may give direction to any of the States regarding financial matters.
- (b) The President may ask the States to reduce the salaries and allowances of all or any class of persons in government service.
- (c) The President may ask the States to reserve all the money bills for the consideration of the Parliament after they have been passed by the State Legislature.
- (d) The President may also give directions for the reduction of salaries and allowances of the Central Government employees including the Judges of the Supreme Court and the High Courts.

As mentioned earlier So far, fortunately, financial emergency has never been proclaimed.

FUNDAMENTAL RIGHTS

4.1:-DEFINITION-

Fundamental Rights are those basic conditions of social life without which a citizen cannot be at his best self or those basic conditions which are very essential for the good life of a citizen.

In pre-constitutional india we didn't had any concept of fundamental rights,We have borrowed the concept of Fundamental Rights from U.S.A. which was the first country in the world, to include a Bill of Rights in its constitution.

fundamental rights falls In Part III of the Constitution from art. 12 to art. 35.

the Fundamental Rights are justiciable when we say word "justiciable" It means that the citizens can seek the assistance of the courts for the enforcement of their Fundamental Rights under article 32 (Supreme Court) and article 226 (High Courts).

An individual as well as group of people can ask the court to issue the writs-

The writ of certiorari is one of the writs issued by the High Court or the Supreme court to protect the Fundamental rights of the citizens. It is issued to a lower court directing it that the record of a case be sent up for review with all the files, evidence and documents with an aim to overrule the judgement of the lower court.

The writ of mandamus is an order of a court of law issued to a subordinate court or an officer of government or a corporation or any other institution commanding the performance of certain acts or duties.

The Fundamental Rights can also be suspended during the Emergency under Article 359 of the Constitution by the President of India.as we discussed earlier during national emergency

these rights can be suspended but not those conferred in art. 20 and art. 21.

The Fundamental Rights are not absolute in nature.Certain restrictions can be placed on them in the interest of security of the state, public order, friendly relations with foreign states and to maintain decency or morality.

4.2:-description of fundamental rights-

U.S.A. was the first country in the world to make a provision for the Bill of Rights for its citizens.

The Fundamental Rights are contained in Part III of the Constitution.The Fundamental Rights contain twenty four Articles from Article 12 to 35.In the above Articles not only the rights have been defined elaborately but limitations have also been laid down.

there are some restrictions too,Due to these very restrictions it has been contended them that the Indian Constitution which has granted the fundamental rights with one hand has taken them away with the other hand.

These Fundamental Rights can be suspended during emergency by the President of India under Article 359.

The Fundamental Rights are justiciable. Under Article 32 of the Constitution, a person can go to the Supreme Court for the enforcement of these rights. Similarly, under Article 226 a person can go to the High Courts for the enforcement of these rights within their territorial jurisdiction.

Following are the Fundamental Rights granted under the Constitution of India:

(i) Right to Equality

Articles 14 to 18 of the Indian Constitution have been devoted to the Right to Equality. This right ensures social and political equality to the citizens of India. The Right to Equality means the following things:

(a) Article 14 guarantees to all persons equality before the law and equal protection of laws within the territory of India. This Article asserts the supremacy of law or Rule of law.

(b) Every citizen irrespective of his status is subject to the same law and the same courts. Any law which is discriminatory in its character will be held unconstitutional.

(c) According to Article 15 the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(d) The citizens will not be subjected to any disability on any of the above mentioned grounds in regard to access to shops, hotels, places of public entertainment or the use of wells, tanks, ghats, roads and other public places wholly or maintained out of state funds.

(e) Article 16 has guaranteed equality of opportunity in matters relating to employment or appointment to public services to all citizens irrespective of religion, race, sex, descent, place of birth or residence.

(f) Article 17 has declared untouchability in any form as unconstitutional.

(g) Article 18 has laid down that no titles, not being military or academic distinction, shall be conferred by the State.

(h) But nothing in the above Article 16 will prevent the state from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(ii) Right to Freedom

Articles 19 to 22 of the Constitution cover the Right to Freedom. Out of these, Article 19 is the most important. Under this Article, the following freedoms are guaranteed to the citizens of India:

(a) Freedom of speech and expression;

- (b) Freedom to assemble peaceably and without arms;
- (c) Freedom to form associations or unions;
- (d) Freedom to move freely throughout the territory of India;
- (e) Freedom to reside and settle in any part of the territory of India;
- (f) Freedom to practice any profession, or to carry on any occupation, trade or business.

But nothing in the above shall prevent the state from making any law, insofar as such law imposes reasonable restrictions in the interest of the sovereignty and integrity of India or the security of state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The other three Articles protect the individual's life and liberty as under:

(a) Article 20 states "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence".

(b) No person shall be prosecuted and punished for the same offence more than once.

(c) No person who is accused of any offence, shall be compelled to be a witness against himself.

(d) Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Supreme Court has held in *Maneka Gandhi Vs. Union of India* (1978) that the aforesaid procedure must not be arbitrary, unfair or unreasonable.

(e) Article 22 states that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice.

(f) Every person who is arrested and detained in custody without the authority of a magistrate shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for journey from place of arrest to the court of the magistrate.

(g) Of course, the above does not prevent the state from enacting the law for preventive detention with certain safeguards like the Advisory Board, etc.

(iii) Right against Exploitation

Article 23 and 24 deal with this Right.

(a) Under Article 23, traffic in human beings and begar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(b) Of course, nothing in the above Article shall prevent the state from imposing compulsory service for public purposes, and in imposing such service, the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

(c) Article 24 says that "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

(iv) Right to Freedom of Religion

This right has been dealt with under Articles 25-28. Following are the main points:

(a) Article 25 gives freedom of conscience and freedom to profess, practice and propagate any religion subject of course to public order, morality and health.

(b) Article 26 grants every citizen the right to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire movable and immovable property and to administer such property in accordance with law.

(c) Under Article 27 "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination".

(d) Article 28 states "No religious instruction shall be imparted in any educational institution wholly maintained out of State funds." But the educational institutions established by trusts or endowments and managed by them would be free to impart any religious instruction in them as they deem essential.

The Articles relating to the freedom of religion have helped to establish a Secular State in India with the State adopting an attitude of strict impartiality in matters of religion.

(v) Cultural and Educational Rights :

Articles 29 and 30 deal with these rights. These articles ensure, to every section of the citizens, the protection of their language, script or culture.

(a) Article 29 states that "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."

(b) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

(c) Article 30 states that "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

(d) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

(vi) Right to Constitutional Remedies

(a) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by the Constitution has been guaranteed under Article 32.

(b) The Supreme Court shall have the power to issue directions or order or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(c) The right guaranteed by this Article shall not be suspended except as otherwise provided for by the Constitution.

(d) This right can only be suspended during an Emergency by the President of India under Article 359.

(e) These above-mentioned writs can also be issued by the High Courts for protecting Fundamental Rights under Article 226 of the Constitution within their territorial jurisdiction.

(f) This right relating to constitutional remedies was rightly described by Dr. Ambedkar as the "heart and soul of the Constitution". This description is quite justified as in the absence of this right all other rights are of no consequence since they could not be enforced. This right makes the other rights as justiciable.

NEED FOR EMERGENCY

1. NEED FOR NATIONAL EMERGENCY IN INDIA-

National Emergency has been declared in our country three times so far.

For the first time, emergency was declared on 26 October 1962 after China attacked our borders in the North East. This National Emergency lasted till 10 January 1968, long after the hostilities ceased.

For the second time, it was declared on 3 December 1971 in the wake of the second India-Pakistan War and was lifted on 21 March 1977. While the second emergency, on the basis of external aggression, was in operation,

third National Emergency (called internal emergency) was imposed on 25 June 1975. This emergency was declared on the ground of 'internal disturbances'. Internal disturbances justified imposition of the emergency despite the fact that the government was already armed with the powers provided during the second National Emergency of 1971 which was still in operation.

AND AS WE DISCUSSED IN EARLIER POINTS, THAT AFTER 1978 THE WORD "INTERNAL DISTURBANCES" WAS SUBSTITUTED BY "ARMED REBELLION". TO NARROW THE VIEW OF DISTURBANCES AND TO REMOVE THE VAGUENESS AND AMBIGUITY.

The basic need for an emergency occurs whenever there is imbalance within the country, whether wholly or partly.

The ultimate aim and object of every government or political entity is to secure good life and safe life to its citizen, and the time we say citizen it means the public of country at large.

Whether we talk about the first emergency caused by China attack or the second or the third emergency, in all the cases the social equilibrium of the country was imbalanced and security of citizen was on the stake.

Emergency though suspend the fundamental rights excluding those conferred in art.20 and art. 21, it does transfer the powers from the hand of state government to the hand of central government. but this all phenomenon took place just to secure its citizen. this is what the concept and policy of "welfare state" - "greatest happiness to greatest number"

Fundamental rights are given to individual, and the only reason they are suspended during an emergency is to secure the people of country at large.

Social interest is always upper then that of individual interest.

2.NEED FOR STATE EMERGENCY IN INDIA-

This type of emergency has been imposed in most of the States at one time or the other for a number of times. in 1951 that this type of emergency was imposed for the first time in the Punjab State.

In 1957, the Kerala State was put under the President's Rule.

There have been many cases of misuse of 'constitutional breakdown'. For example, in 1977 when Janata Party came into power at the Centre, the Congress Party was almost wiped out in North Indian States. On this excuse, Desai Government at the Centre dismissed nine State governments where Congress was still in power. This action of Morarji Desai's Janata Government was strongly criticised by the Congress and others. But, when in 1980(after Janata Government had lost power) Congress came back to power at the Centre under Mrs.Gandhi's leadership and dismissed all the then Janata Party State Governments. In both cases there was no failure of Constitutional machinery, but actions were taken only on political grounds.

In 1986, emergency was imposed in Jammu and Kashmir due to terrorism and insurgency.

In all, there are more than hundred times that emergency has been imposed in various States for one reason or the other. However, after 1995 the use of this provision has rarely been made.

3.NEED FOR FINANCIAL EMERGENCY IN INDIA-

So far, IN INDIA financial emergency has never been proclaimed. But the need and reason for financial emergency ,if ever occur,would be- the financial stability or credit of India

or any of its part is in danger

FUNDAMENTAL RIGHTS VS. EMERGENCY

War Emergency

If the president is satisfied that a grave emergency exists whereby the security of India or any part of its territory is threatened by war, external aggression or armed rebellion, he may proclaim a state of emergency under Article 352.

Constitutional Emergency in the States

If the President is satisfied on receipt of a report from the Governor or otherwise that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution, he is empowered to proclaim an emergency under Articles 356

Suspension of Fundamental Rights

During the period of emergency, as declared under either of the two categories discussed above, the State is empowered to suspend the Fundamental Rights guaranteed under Article 19 of the Constitution. The term 'State' is used here in the same sense in which it has been used in the Chapter on Fundamental Rights. It means that the power to suspend the operation of these Fundamental Rights is vested not only in Parliament but also in the Union Executive and even in subordinate authority. Further, the Constitution empowers the President to suspend the right to move any court of law for the enforcement of any of the Fundamental Rights. It means that virtually the whole Chapter on Fundamental Rights can be suspended during the operation of the emergency. However, such orders are to be placed before Parliament as soon as possible for its approval.

But art. 20 and art. 21 can not be suspended in any case .

Suspension of fundamental rights during emergency is a matter of debate and conflicts of opinion ab initio.

it would be a mistake to treat human rights as though there were a trade-off to be made between human rights and goals such as security and development. . . . Strategies based on the protection of human rights are vital both for our moral standing and the practical effectiveness of our actions' - Kofi Annan

Fundamental rights are moral rights which have been made legal by the Constitution. These constitutional rights which are 'fundamental' in character represent rights in the 'strong sense'. They are

distinct from ordinary legal and constitutional rights because they may not be restricted on ground of general utility.

The very essence of these rights is that they are guaranteed even if the majority would be worse off in doing so, that fundamental rights are necessary to protect the dignity of an individual. Invasion of these rights is a very serious matter and it means treating a man as less than a man. This is grave injustice and it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it.

After so many debates and many conflicts the question arise-

Whether the fundamental rights are absolute?

fundamental rights are not absolute in nature. The government may impose restrictions on three grounds.

The government might show that the values protected by the original right are not really at stake in the marginal case or at stake only in some attenuated form.

Alternatively if it may show that if the right is defined to include the marginal case, then some competing right, in the strong sense, would be abridged. This is the principle of competing rights of other members of society as individuals. Making this 'rights' choice and protecting the more important at the cost of the less important, does not weaken the notion of rights. Hence the government may limit rights if it believes that a competing right is more important.

The third possibility is if it may show that if the right were so defined then the cost to society would not be simply incremental but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity of the individual it may result in.

But another principle is there which is used in many human rights treaties and in national constitutions as well.

government may not arbitrarily deprive persons of their fundamental rights, Most of debates on the issue assume a necessary 'trade off' between rights

and security, however it is submitted that the relation between the two is more complex than that.

Restrictions on rights on ground of security are not justified per se. This may be because the trade off is unnecessary where the government may pass effective laws which do not violate rights or when harsh laws restricting rights will not yield results. However tensions do arise. If the security strategy genuinely implicates rights, then it may be justified and must be governed by the principle of proportionality. Proportionality analysis is an uphill task and involves balancing of the two social goods of liberty and security.

It involves analysing if there exists a rational connection between the aims of the legislation and the means employed, if there is a less restrictive means available in order to achieve the aim. Thirdly, comparing the effectiveness of the means with the infringement of rights.

The Habeas Corpus Case

The most controversial use of emergency power in the history of India has been between 1975 and 1977. The experience of this state of emergency exposed the weaknesses and inadequacies of safeguards on use of crisis power by the government. Though restrictions were imposed on various rights in this period, the most serious infringement was of personal liberty, which is the focus on the next section.

The President issued orders under the Constitution of India, art. 359(1) suspending the right of any person to move any court for enforcement of fundamental rights under arts. 14, 21 and 22 and 19 for the duration of the emergency. Following this declaration hundreds of persons were arrested and detained all over the country under the swoop of the Maintenance of Internal

Security Act, 1971.

Various persons detained under Maintenance of Internal Security Act, 1971, s. 3(1) filed petitions in different high courts for the issue of the writ of habeas corpus.

This case we'll discuss in more elaborate way in later topics.

The balance between rights and security may be enhanced by making further changes than those recommended in the 1978 amendment. This includes making the information withheld by the government under art. 22(6) justiciable.

Seervai suggests this may be achieved by allowing a judge to examine the claim of the government that the information of grounds of detention has to be withheld in public interest. This via media is on the lines of the special advocate system in Britain.

The Indian experience with emergency powers reveals a mixed record. These powers were used more responsibly in 1962 than in 1970. The principle of proportionality must thus be the governing principle to ensure that rights are not subverted in the name of security.

ROLE OF 42nd & 44th AMENDMENT

42nd amendment

The Forty-second Amendment Act of 1976 (officially the "Constitution (Forty-second Amendment) Act, 1976") was an amendment to the Constitution of India that reduced the ability of the India's Supreme and High Courts to proclaim laws constitutional or unconstitutional. Passed by the Indian parliament on 2 November 1976, it also made India a socialist secular republic and laid down the duties of Indian citizens to their government. It was passed by the parliament during the Indian Emergency (1975 - 77) brought by the Congress government headed by Indira Gandhi .

STATEMENT OF OBJECTS WITH RESPECT TO POWERS OF COURT, RIGHTS AND EMERGENCY PROVISION

to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles.

It is also proposed to take away the jurisdiction of High Courts with regard to determination of Constitutional validity of Central laws and confer exclusive jurisdiction in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the same Central law in different High Courts and the consequent possibility of the Central law being valid in one State and invalid in another State.

It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under article 226.

Insertion of new article 31D.-After article 31C of the Constitution and before the sub-heading "Right to Constitutional Remedies", the following article shall be inserted, namely:---

`31D. Saving of laws in respect of anti-national activities.- (1)Notwithstanding anything contained in article 13, no law providing for-

(a) the prevention or prohibition of anti-national activities; or

(b) the prevention of formation of, or the prohibition of, anti-national associations,

Insertion of new article 32A.-After article 32 of the Constitution, the following article shall be inserted, namely:-

"32A. Constitutional validity of State laws not to be considered in proceedings under article 32.- Notwithstanding anything in article 32, the Supreme Court shall not consider the constitutional validity of

any State law in any proceedings under that article unless the constitutional validity of any Central law is also in issue in such proceedings."

Insertion of new article 131A.-After article 131 of the Constitution, the following article shall be inserted, namely:-

"131A. Exclusive jurisdiction of the Supreme Court in regard to questions as to Constitutional validity of Central laws.- Notwithstanding anything contained in any other provision of this Constitution, the Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine all questions relating to the constitutional validity of any Central law.

44th AMENDMENT

The Forty-fourth Amendment Act of 1978 (officially the "Constitution (Forty-second Amendment) Act, 1978") was an amendment to the Constitution of India that reduced or removed the provisions made by 42nd amendment. This amendment was taken place during the government of Janta Party.

SALIENT FEATURES OF CA-44

In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to article 19 and article 31 is being deleted.

A Proclamation of Emergency under article 352 has virtually the effect of amending the Constitution by converting it for the duration into that of a Unitary State and enabling the rights of the citizen to move the courts for the enforcement of fundamental rights---including the right to life and liberty---to be suspended. Adequate safeguards are, therefore, necessary to ensure that this power is properly exercised and is not abused. It is, therefore, proposed that a Proclamation of Emergency can be issued only when the security of India or any part of its territory is threatened by war or external aggression or by armed rebellion. Internal disturbance not amounting to armed rebellion would not be a ground for the issue of a Proclamation.

Further, in order to ensure that a Proclamation is issued only after due consideration, it is sought to be provided that an Emergency can be proclaimed only on the basis of written advice tendered to the President by the Cabinet. In addition, as a Proclamation of Emergency virtually has the effect of amending the Constitution, it is being provided that the Proclamation would have to be approved by the two Houses of Parliament by the same majority which is necessary to amend the Constitution and such approval would have to be given within a period of one month. Any such Proclamation would be in force only for a period of six months and can be continued only by further resolutions passed by the same majority. The Proclamation would also cease to be in operation if a resolution disapproving the continuance of the Proclamation is passed by Lok Sabha. Ten per cent. or more of the Members of Lok Sabha can requisition a special meeting for considering a resolution for disapproving the Proclamation.

As a further check against the misuse of the Emergency provisions and to put the right to life and liberty on a secure footing, it would be provided that the power to suspend the right to move the court for the

enforcement of a fundamental right cannot be exercised in respect of the fundamental right to life and liberty. The right to liberty is further strengthened by the provision that a law for preventive detention cannot authorise, in any case.

JUDICIAL INTERPRETATION OF VALIDITY OF SUSPENSION OF FUNDAMENTAL RIGHTS

1) POSITION BEFORE 1978:-

a) suspension of art. 19- makhan singh Vs. State of punjab

-Art.358 makes it clear that things done or omitted to be done during emergency could not be challenged even after the emergency was over.in other words the suspension of art.19 was complete during the period in question and legislative and executive action which contravened art.19 could not be questioned even after the emergency was over.

B)suspension of art.20,21

A.D.M. Jabalpur Vs. shivkant shukla

The President issued orders under the Constitution of India, art. 359(1) suspending the right of any person to move any court for enforcement of fundamental rights under arts. 14, 21 and 22 and 19 for the duration of the emergency. Following this declaration hundreds of persons were arrested and detained all over the country under the swoop of the Maintenance of Internal Security Act, 1971.

Various persons detained under Maintenance of Internal Security Act, 1971, s. 3(1) filed petitions in different high courts for the issue of the writ of habeas corpus.

The high courts broadly took the view that the detention may be challenged on the grounds of ultra vires, rejecting the preliminary objection of the government. Aggrieved by this the government filed appeals, some under certificates granted by high courts and some under special leave granted by the Supreme Court. Despite every high court ruling in favor of the detenus³⁶. The Supreme Court ruled in favor the government. What the court except for Khanna, J. failed to realise is that the right to personal to life and liberty are human rights and is not a 'gift of the Constitution'. International Covenant on Civil and Political Rights ,art. 4 recognises the right to life and personal liberty to be a non- derogable right even during times of

emergency.

C) suspension of art.14 and 16

Arjun singh vs.state of rajasthan

The question arose whether art.16 is also suspended although it is not mentioned in order, the rajasthan high court held that art.16 remained operative even though art.14 was suspended. the court emphasized that under art.359 the enforcement of only such fundamental rights was suspended as were specifically and expressly mentioned in the presidential order.

S.R. Bommai Vs Union of India

Judgement and condition of art.356 after bommmmai case-

The landmark case of S. R. Bommai v. Union of India, in the history of the Indian Constitution has great implications in Center-State relations. It is in this case that the Supreme Court boldly marked out the and limitations within which Article 356 has to function. The Supreme Court of India in its judgment in the case said that it is well settled that Article 356 is an extreme power and is to be used as a last method in cases where it is manifest that the constitutional machinery in a State has collapsed.

The views expressed by the bench in the case are similar to the concern showed by the Sarkaria Commission.

What are the observations of judges on Article 356 of Constitution of India- In this case the bench observed that the power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material - which may comprise of or include the report of the Governor is a pre-condition. The satisfaction must be formed on relevant material, and must have rational.

Similarly, Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature. However, the subjective satisfaction if based on malice may be questioned in court of law.

The proclamation of emergency can be done by governor only after the approval by both Houses of Parliament under clause (3) of Article 356, and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (c) of clause (1). However, the dissolution of Legislative Assembly can be resorted to only where it is found necessary for achieving the purposes of the Proclamation.

According to Article 356, clause (3) in case both Houses of Parliament disapprove or do not approve the Proclamation, the Proclamation lapses at the end of the two-month period, and in such a situation the government which was dismissed revives. Also the Legislative Assembly, which may have been kept in suspended gets reactivated. Similarly, as the Proclamation lapses, the acts done, orders made and laws passed during the period of two months do not become illegal or void. However, the same laws may be considered for judicial review, repeal or modification by various authorities.

On the other hand, if the Proclamation is approved by both the Houses within two months, the Government which is dismissed does not revive on the expiry of period of the proclamation or on its revocation. Similarly, if the Legislative Assembly has been dissolved after the approval under clause (3), the Legislative Assembly does not revive on the expiry of the period of Proclamation or on its revocation.

The most important point of the court in the case is, according to it Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the Court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction.

The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields. It may happen that while defending the Proclamation, the Minister or the official concerned may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123.

Judicial review of imposition of Article 356

The remark of the Supreme Court that proclamation of emergency is not beyond judicial review is welcome step. The court held that the Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds.

Earlier, with 38th (Amendment) Act by the 44th (Amendment) Act, government had taken out the power of reviewability of the action of imposition of emergency under Article 356(1). Now, under the new circumstances, when called upon, the Union of India has to produce the material on the basis of which action was taken.

CONCLUSION

The history of Indian constitution with respect to fundamental rights and their stability with emergency provisions is full of vagueness and ambiguity.

From the very beginning of “the case of habeas corpus” and makhan singh to the landmark case of S.R. bommai, the provisions and conditions are getting better and better.

Initially even the suspension of art. 20 and 21 during emergency was valid, though those rights are not given by “the constitution” but by nature itself.

No courts had the right and power to look into the matter of cases related to emergency.

But now the condition is different-

Now, the government of India cannot refuse to furnish reasons behind its action. However, the court will not go into the correctness of the material or its adequacy, still it will enquire whether the material was relevant to the action. And, conclusively, it would be enough for court to see if there are some valid reasons for the imposition.