
FUNDAMENTAL RIGHTS DURING AN EMERGENCY IN INDIA

Koshika Malhotra, Vivekananda Institute of Professional Studies, Technical Campus (VIPs-TC), GGSIPU

INTRODUCTION

Article 12-35 included in Part III¹ of the Indian Constitution deals with fundamental rights. These rights guarantee certain freedoms and protections that are necessary for the citizens of a country. These rights are fundamental because they are necessary for the very survival of the citizens and in case of any violation in relation to these rights, the citizens of a country are free to approach the courts. Our freedom fighters and founding fathers had an ardent desire that the future constitution of India should guarantee fundamental entitlements for the citizens of India. These fundamental rights include Right to Equality², Right to Freedom³, Right against exploitation⁴, Right to freedom of religion⁵, Cultural and educational rights⁶, and the Right to Constitutional remedies⁷. In 1978, the right to property mentioned in Article 31 was repealed by the 44th Amendment Act as it was found contrary to other fundamental rights, particularly the right to equality. It, however, has been reallocated to article 300A of part XII as a legal right now.⁸

These above-mentioned rights are not absolute and there are reasonable restrictions imposed on all citizens of a country. The President has the power to withdraw these rights during the time of an emergency, the only exception being the right to life. An emergency in a country can stem from external reasons, internal reasons, or financial reasons. Part XVIII of the Indian

1 Constitution of India, article 12-35, Part III

2 Constitution of India, articles 14-18

3 Constitution of India, articles 19-22

4 Constitution of India, articles 23-24

5 Constitution of India, articles 25-28

6 Constitution of India, articles 29-31

7 Constitution of India, articles 32-35

8 Rai, K. (2009). *The Constitutional Law of India*. Allahabad: Central Law Publications, pp.112-281

Constitution including Articles 352-360 deals with Emergency provisions. This part discusses National emergency, State emergency, and financial emergency. Over the last 75 years, an emergency in India has been proclaimed on three occasions. For the first time during the Chinese Invasion in 1962, then in 1971 during the conflict with Pakistan and lastly due to internal disturbances in 1975. These three occasions would be used to understand the impact of the implementation of an emergency on fundamental rights.

RESEARCH PROBLEM

The aim of this research is to investigate the intricate relationship between emergency provisions, as enshrined in the constitution of India, and their implication on the fundamental rights of the people of India. It seeks to delve into the constitutional provisions governing emergencies in India and understand the extent to which they limit the fundamental rights of the citizens. It will also try to understand the balance between state security and individual liberties during the time of emergency. It will use legal precedents and scholarly articles to explore the historical context and evolution of emergency provisions. Furthermore, the imposition of emergency has also been misused. For the imposition of an emergency, it is crucial that the president consents to it. If the president is satisfied that there has been a problem significant enough to declare an emergency, then he can issue a Proclamation of Emergency. However, the President is only a nominal head and under Article 74(1)⁹ he is bound to follow the advice of the council of ministers and Article 74(2)¹⁰ bars judicial review of such advice. Thus, the Presidential satisfaction for an emergency becomes immune to judicial review and is misused. This paper will also try to analyse this misuse and will try to find ways to prevent it.

RESEARCH QUESTIONS

The following questions will be answered by the researcher in the paper:-

- 1) What are the implications of an emergency on fundamental rights?
- 2) What were the changes brought in by the 44th Amendment Act, 1978?

⁹ Constitution of India, Article 74(1)

¹⁰ Constitution of India, Article 74(2)

- 3) Whether the Proclamation passed by the President enshrined under Article 356 is justiciable?

HYPOTHESIS

- 1) During states of emergency in India, there is a significant erosion of civil liberties and fundamental rights, as evidenced by increased government surveillance, censorship, and restrictions on freedom of speech and assembly.
- 2) Emergency provisions in India have been frequently misused by the executive branch for political gains, leading to the suppression of dissent, curtailment of civil liberties, and violations of fundamental rights.

METHODOLOGY

The method of research used for carrying out research on “Fundamental rights during an emergency in India” is doctrinal research. Doctrinal research is described as the “Normal Judicial research”. It studies the constitutional provisions, i.e. it inquires about what the law is on a particular subject and is all about examining the legal theory and how it has been formed and implemented. The doctrinal analytical approach mainly focuses on case laws, legislation, and other legal documents. An analytical method is adopted to analyze the position of fundamental rights with the help of legislation, international treaties, articles, journals, etc. Other sources include websites, periodicals, and research papers.

PROCLAMATION OF EMERGENCY

In a situation where the president of India finds a serious situation where the security of India is impacted, or any part of India is threatened, or is likely to be threatened, he may declare an emergency. An emergency in India can be proclaimed only by the president and no one else. The emergency provisions are contained in part XVIII of the Constitution of India, from article 352 to Article 356. These provisions allow the Central government to meet any situation which hampers the security of India. The rationale behind this is to secure the unity, integrity, and sovereignty of the country. The president declares an emergency after taking into consideration

the recommendations of his council of ministers in writing. After this advice, it has to be passed by both houses of the parliament with an absolute majority of all the members of the house and 2/3rd of those who are present and voting in a month¹¹. If any of the above-stated requirements do not take place, then the proclamation ceases to operate¹².

The following emergencies are defined in the Constitution of India:-

- 1) Article 352¹³ deals with **NATIONAL EMERGENCY** - imposed due to internal or external aggression or due to war.
- 2) Article 356¹⁴ deals with the **CONSTITUTIONAL APPARATUS IN THE STATE**
- 3) Article 360¹⁵ deals with **FINANCIAL EMERGENCY**

FUNDAMENTAL RIGHTS

The constitution of India offers to all its citizens, individually and collectively, some basic freedoms. These are guaranteed in the constitution in the form of six broad categories of fundamental rights which are justifiable. Articles 12 to 35 contained in Part III of the constitution of India deal with Fundamental rights. These include –

- 1) Right to equality (Article 14-18)
- 2) Right to freedom (Article 19-22)
- 3) Right against exploitation (Article 23-24)
- 4) Right to freedom of religion (Article 25-28)
- 5) Cultural and Educational rights (Article 29-30)
- 6) Right to Constitutional remedies (Article 32)

11 'Judiciary Under Executive Assault' (1981) PUCL Bulletin

12 Mofidul Islam, 'Position of Fundamental Rights During Emergency in India' (2020) 11 International Journal of Management, last visited on 28th March, 2024

13 Constitution of India, Article 352

14 Constitution of India, Article 356

15 Constitution of India, Article 360

RIGHT TO EQUALITY

Articles 14-18¹⁶ deal with the right to equality in India. “The Right to Equality, enshrined as a fundamental right in the Indian Constitution, plays a crucial role in building a just and equitable society. The provisions under this right collectively form the bedrock upon which the edifice of Indian democracy is built.”¹⁷. Article 14 says that "the state shall not deny to any person equality before the law and equal protection of the laws within the territory of India". According to Article 15, the state is not permitted to discriminate against any citizen on grounds only of religion, race, caste, sex, or place of birth. It also states that no citizen shall be subjected to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex, or place of birth. The term which is important here is “only”, which depicts that discrimination on grounds apart from those mentioned in the articles is not prohibited. Article 16 provides equal opportunity to all citizens in matters of employment or in relation to appointment to any office under the State. Through Article 17 the constitution of India has abolished untouchability and its practice in any form and Article 18 deals with the abolition of titles and distinctions.

RIGHT TO FREEDOM

Article 19 to 22¹⁸ deal with the right to freedom. The right to Freedom, revered as a fundamental right in the Indian Constitution, plays a significant role in realising the ideal of liberty. Article 19 of the Indian Constitution guarantees certain freedoms to all citizens of India. It encompasses six fundamental rights: Right to freedom of speech and expression, Right to assemble peacefully and without arms, Right to form associations, unions, or co-operative societies, Right to move freely throughout the territory of India, and Right to reside and settle in any part of the territory of India. Prison Rights are stated under Article 20 which says that no man shall be convicted without due cause. The conviction must be made only on violation or mistake of law and not merely on the mistake of facts. Article 21 declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 22 provides safeguards for persons who are arrested or detained.

¹⁶ Constitution of India, article 14, 15, 16, 17 and 18

¹⁷ <https://www.nextias.com/blog/right-to-equality/>

¹⁸ Constitution of India, Article 19, 20, 21 and 22

RIGHT AGAINST EXPLOITATION

The Right Against Exploitation, enshrined as a fundamental right in the Indian Constitution, ensures human dignity, freedom, and social justice for all citizens of India. It acts as a protector and safeguards the individual from the shackles of forced labour, human trafficking, and child exploitation. These rights are enumerated in articles 23 to 24¹⁹. Article 23 outlaws forced labour, human trafficking, beggary, and other exploitative practices. Article 24 prohibits children under the age of 14 from working. Children under 14 are not allowed to engage in risky activities like building, mining, or factory labour.

RIGHT TO FREEDOM OF RELIGION

These rights are listed in Article 25 to 28²⁰. These rights address the religious minority in our country and include the freedom to pursue a career, practice one's preferred religion, and manage one's own affairs. Individuals have the ability to attend any temple or religious institution of their choosing and are not required to pay religious taxes.

CULTURAL AND EDUCATIONAL RIGHTS

Cultural and Educational rights are included under article 29 to 30²¹ and are given to the minority of our society. Article 29 states that any citizen living in the territory of India, shall have a right to protect and conserve their distinct language, script and culture. It also states that no person shall be denied admission into an educational institution maintained by the state on grounds only of religion, race, caste, language or any of them. Article 30 gives the minority community of India the right to establish and run their own educational institutions.

RIGHT TO CONSTITUTIONAL REMEDIES

Article 32²² grants individuals the right to move to the Supreme Court for violations of their fundamental rights as outlined in Part III of the Constitution. The sole requirement is to follow

19 Constitution of India, article 23 and 24

20 Constitution of India, article 25,26,27 and 28

21 Constitution of India, Article 29 and 30

22 Constitution of India, Article 32

the proper procedure for accessing SC. The second clause of this article allows the Supreme Court to issue directives or writs such as habeas corpus, mandamus, prohibition, quo warranto, and certiorari.

All of these fundamental rights, above mentioned, cannot be interfered with until there is an emergency in the country.

EMERGENCE OF EMERGENCY PROVISIONS IN INDIA

India's backdrop of political upheaval and the necessity for national unity led to the incorporation of emergency provisions in India. While the constitution was being drafted, members of the Constituent Assembly debated extensively on the necessity of these provisions. Before independence and even after it, many incidents happened in India. Consequently, those incidents compelled the Constitution framers to think of such provisions²³.

Disorderly and obstreperous forces of regionalism, languish, casteism and communalism²⁴ developed disharmony in the society and disrupted the peace of the country. During the period marked by communal tensions between Hindu and Muslim communities, challenges arose in maintaining democratic stability in India. The framing of the constitution coincided with the complexities surrounding the accession of Kashmir and the looming threat from Pakistan. Additionally, certain princely states such as Hyderabad and Junagarh posed obstacles to integration into the Indian union due to their defiance. These circumstances underscored the necessity for Article 352, as separatist tendencies in these regions posed significant geopolitical challenges.

The emergence of communist uprisings disrupted democratic processes and social cohesion within the country, notably observed in activities among peasants and workers in Telangana.

23 R P Dutt, *India Today and Tomorrow* (1955)

24 B C Das, 'Emergency Provision in Indian Constitution: A Study in Comparative Analysis' (1977) 38 *Indian Journal of Political Science* <<https://www.jstor.org/stable/41854792>> accessed 29th March, 2024

These developments prompted the formulation of emergency provisions within the foundational document of our nation. The framers of the Constitution were concerned about ensuring the effective operation of state governments amidst such challenges, leading to the incorporation of Article 356.

Additionally, the economic strain resulting from partition and a sudden decline in foreign exchange reserves necessitated measures to address potential legal complications. Dr Ambedkar advocated for the inclusion of Article 360 to pre-emptively manage such economic crises and uphold the stability of the nation.

PAST PRONOUNCEMENTS OF NATIONAL EMERGENCY

A national emergency in India has been imposed thrice till now. These occasions were –

1) 26TH October 1962-10TH January 1968

This was the first national emergency. It was declared because of the Chinese hostility in the northeast. The Chinese army launched a full-scale invasion of India, which caught the Indian Military and the government off guard. At this time, the security of India was being threatened by external aggression, and hence, the government declared a state of national emergency.

2) 3rd December 1971-21st March 1977

It was imposed during the 2nd war between India and Pakistan, again on grounds of external aggression.

3) 25th June 1975-21st March 1977

Fakhruddin Ali Ahmed, the President of India at the time, proclaimed a national emergency on June 26, 1975, following a recommendation from Prime Minister Indira Gandhi. The announcement of this third national emergency was made by the Prime Minister on All India Radio, catching the citizens off guard and leaving them puzzled about the rationale behind such a decision. Even Gandhi's Cabinet ministers, who were informed just before the radio broadcast, struggled to grasp the significance of the situation. This emergency period concluded on March 21, 1977.

When the second emergency was still in effect, another emergency was declared on 25 June 1975. The first and second emergency in India was declared on grounds of external aggression but the third one was declared on grounds of internal disturbances.

PROCEDURE FOR DECLARING EMERGENCY

The Indian Constitution states that whenever there is an emergency caused due to war, armed rebellion, or external aggression on the country then to resolve the situation there comes the need to declare an emergency, and the whole power comes under the President's hand. It can be imposed by the President of India alone if he thinks that (i) the country is under threat or (ii) any part of it or there is (iii) likely to be a threat²⁵.

The proclamation of emergency must be approved by both the houses of parliament within one month from the date of its issue. However, if the proclamation of emergency is issued at a time when the Lok Sabha has been dissolved or the dissolution takes place during the period of one month without approving the proclamation, then the proclamation survives until 30 days from the first sitting of Lok Sabha after its reconstitution, provided the Rajya Sabha has in the meantime approved it. If approved by both the houses, the Emergency continues for 6 months and can be extended to an indefinite period with the approval of the Parliament for every six months. Every resolution approving the proclamation of emergency or its continuance must be passed by either House of Parliament by a special majority²⁶.

Proclamation of emergency i.e. Article 352 of the Indian Constitution and states that: (1) "the president is satisfied that due to war, armed rebellion or external aggression the security of

²⁵ Pathik Choudhury, 'Impact Of Emergency On Fundamental Rights' (2016) 2 International Journal of Legal Developments and Allied Issues <https://thelawbrigade.com/wp-content/uploads/2019/05/pathik.pdf> accessed on 29th March, 2024

²⁶ https://www.drishtiias.com/to-the-points/Paper2/emergency-provisions/print_manually accessed on 29th March, 2024

India or any part of it is in threat, by proclamation, he may declare emergency in respect to the whole of India or the threatened part.”

For dealing with such astonishing provisions which may disturb the peace, stability, security, etc. of the country or its part, the Constitution of India has put in some rules. At times of emergency, the state has the complete right to take over the legislative and executive functions under its control.

EFFECTS OF AN EMERGENCY

Article 353 of the Indian Constitution delineates the repercussions and ramifications ensuing from the proclamation of an emergency within the country. The President of India holds the authority to declare a national emergency if convinced of a threat to the nation's security, whether due to war, external aggression, or armed rebellion. Upon the declaration of a national emergency, Article 353 is invoked, permitting the suspension or alteration of specific provisions of the Constitution to effectively address the crisis. In such a scenario, the President is empowered to issue directives for the efficient execution of emergency measures, extending to any state or authority within the nation. Furthermore, the President is vested with the prerogative to assume some or all of the functions of a state government and the powers vested in or exercisable by anybody or authority within the state.

Moreover, amid a national emergency, the President holds the prerogative to suspend certain fundamental rights guaranteed under Part III of the Constitution. However, certain rights, notably the right to life and personal liberty, remain immune from suspension even during such exigencies. The suspension of other fundamental rights is contingent upon the proviso that it does not impinge upon the right to access the courts for the enforcement of rights under Articles 20 and 21.

Crucially, it is imperative to underscore that the suspension of fundamental rights is circumscribed. The President is authorized to suspend these rights solely to the extent indispensable for addressing the emergency at hand. The suspension ceases to be operative upon the revocation of the emergency or its cessation.

Consequences of an emergency²⁷ -

Executive:

During a declared emergency, the Union government gains authority to direct states on the exercise of executive powers, extending beyond the region where the emergency is proclaimed. This shift was introduced by the Constitution (42nd Amendment) Act 1976, broadening the Union's executive reach to other states if India's security or any part of its territory is threatened within the emergency-declared area. Such executive directions are typically not permissible during normal circumstances, barring specific exceptions.

Legislative:

An emergency proclamation empowers Parliament to legislate on matters within the State List (List II). This suspension of the delineation of legislative powers between the Union and the states, however, does not affect the authority of state legislatures.

Financial:

The central government gains the ability to alter revenue distribution between the Union and the states during an emergency. The President may define the financial arrangement between the Union and the states, as outlined in Articles 268 to 279 of the Constitution. Such orders are subject to parliamentary scrutiny and automatically expire upon the cessation of the emergency.

Extension of Lok Sabha Tenure:

The tenure of the Lok Sabha can be prolonged during an emergency, with Parliament authorized to extend it for up to one year at a time. However, such extensions cannot exceed six months beyond the end of the emergency proclamation.

²⁷ <https://blog.ipleaders.in/emergency-india/> accessed on 9th April, 2024

Suspension of Fundamental Rights under Article 19:

Article 358 of the Indian Constitution allows for the suspension of fundamental freedoms guaranteed by Article 19 during a declared emergency. This suspension enables the state to enact laws or take executive actions that abridge or curtail the rights protected by Article 19. These suspended freedoms automatically revive once the emergency proclamation ceases to be operative.

STATE EMERGENCY AND ITS EFFECTS

"President's rule" is an alternative term used to refer to a state emergency, declared in situations where there is a breakdown of the constitutional machinery within a state. If the President of India, based on a government report or other sources, determines that the state government is unable to function in accordance with the Constitution, a state emergency can be proclaimed. Parliamentary approval for such an emergency must be obtained within two months.²⁸

Procedure for declaring a State Emergency mandates that it must be presented before both houses of Parliament and approved within two months; failure to secure approval within this timeframe renders it null and void. Once sanctioned, it remains in effect for six months, extendable up to a year. However, two specific circumstances allow for extensions beyond one year: if a National Emergency is already in force or if state assembly elections cannot be conducted, as conveyed by the Election Commission.

Effects of a State Emergency include the President assuming all or some of the powers of the state government, governor, or any executive authority. Additionally, the President may suspend or dissolve the legislative assembly. The President can also order the parliament to draft laws in place of the state legislature.

28 Shylashri Shankar, 'The State Of Emergency In India: Böckenförde's Model In A Sub-National Context' (2018) 19 German Law Journal <http://file:///C:/Users/muska/Downloads/03_Vol_19_No_02_Shankar.pdf> accessed on 9th April, 2024

Punjab has witnessed the imposition of President's rule on eight occasions. In terms of the total duration, Punjab remained under the direct control of the President for a cumulative period of 3,510 days. Specifically, spanning from 1987 to 1992, Punjab was subject to President's rule continuously for a period of five consecutive years. For a decade, Calcutta also experienced President's rule. From 1990 to 1996 which is around 6 years, emergency was proclaimed in Jammu and Kashmir.

FINANCIAL EMERGENCY

A financial emergency can be declared by the President under Article 360²⁹ of the Indian Constitution in the event of an economic crisis threatening the credit of India or financial stability. Parliamentary approval for such an emergency must be obtained within two months, although this provision has never been invoked. During a financial emergency, the President is empowered to reduce the salaries of all judges of the High Court and Supreme Court, as well as government officials. State legislatures are required to seek the President's approval for their money bills.

Effects of a financial emergency include:

- a) The Union Government can issue directives to any state regarding financial matters.
- b) The President can order the reduction of government servants' salaries.
- c) Salaries of central government employees may also be reduced.
- d) After the state legislature passes money bills, the President can reserve them for consideration by Parliament.

A Financial emergency has never been imposed in India before.

²⁹ Constitution of India, Article 360

POSITION OF THE DOCTRINE OF SEPARATION OF POWERS DURING EMERGENCY

The doctrine of "separation of powers" is crucial for the functioning of a normal government, but it faces significant challenges during times of national emergency when normal governance is disrupted. In such exceptional situations, checks and balances may be suspended, leading to an increased risk of various government organs attempting to exceed their powers. However, there is a general consensus that even during emergencies, the principle of separation of powers should be upheld. This was a contentious issue addressed in the *Rameshwar Prasad v. State of Bihar*³⁰ case. The case questioned whether the imposition of Article 356, without proper consideration of government reports or consultation with state authorities, amounted to an overreach of legislative powers. The central legislature essentially assumed the authority of the state legislature. The court ruled in this case that there was a clear violation of the doctrine of separation of powers.

FUNDAMENTAL RIGHTS DURING EMERGENCY

The imposition of emergency in a democratic nation disrupts the foundational principles upon which the state machinery operates, particularly affecting the fundamental rights guaranteed to all citizens. In our country, the imposition of an emergency significantly impacts fundamental rights, which are enshrined in the same document as emergency provisions. During extraordinary circumstances, Article 359 allows for the suspension of fundamental rights, a provision interpreted by the framers of the constitution to address potential threats to national security³¹. The balance between protecting national security and safeguarding human rights has been a significant concern. Initially, all fundamental rights were suspended under Article 359, but after the 44th amendment, it became clear that only certain rights, excluding those under Articles 20 and 21³², could be suspended. These specific rights are exempt from suspension under presidential orders.

30 *Rameshwar Prasad v State of Bihar* AIR 1958 Pat 210

31 Shruti Kumari, 'Fundamental Rights & Proclamation Of Emergency' [2019] Legal Desire International Journal on Law <<https://legaldesire.com/fundamental-rights-proclamation-of-emergency/>> accessed on 10th April, 2024

32 Constitution of India, Article 20 and 21

President sustains his power to suspend the fundamental rights from Article 35 of part III of the Constitution. The article says that if the emergency is imposed then, the president by order can declare one's power and right to move to court to enforce such rights as suspended, excluding articles 20 & 21. The proceedings of such rights which are pending in court shall also be suspended until the emergency ends. It is enforceable in the whole of India or in any part of it in state emergency cases. Any order under art 35(1) has to be at the earliest presented before both houses.

PROS AND CONS OF SUSPENSION OF FUNDAMENTAL RIGHTS DURING EMERGENCY

Suspending fundamental rights during an emergency can indeed facilitate swift decision-making by the president, allowing for timely actions to address the crisis effectively. In times of emergency, such as natural disasters or threats to national security, quick and decisive measures may be necessary to protect the populace and maintain order. Without the constraints of fundamental rights, the president can enact policies and deploy resources promptly, potentially averting further harm or chaos.

However, the suspension of fundamental rights, particularly the right against exploitation, poses significant risks to citizens. When this right is suspended, individuals may be vulnerable to abuse and coercion by those in positions of authority. Without legal protections in place, individuals may be forced into actions against their will, subjected to exploitation, or denied their basic freedoms. This can create a sense of helplessness and fear among the population, eroding trust in the government and institutions meant to protect them. Furthermore, the inability to approach the courts for recourse exacerbates the situation, leaving individuals without avenues for seeking justice or redress. In such circumstances, people with authority may misuse their power for personal gain or to suppress dissent, further exploiting the general public and undermining democratic principles.

Overall, while suspending fundamental rights during emergencies may enable decisive action by the president, it also raises serious concerns about the protection of citizens' rights and liberties. Balancing the need for effective crisis management with safeguarding individual freedoms remains a critical challenge for democratic societies facing extraordinary circumstances.

CHANGES BROUGHT IN BY THE 44TH AMENDMENT ACT, 1978

The changes brought about by this amendment can be categorized into two main aspects. Firstly, it altered the authority vested in the president concerning the suspension of fundamental rights, explicitly stating that two specific articles, namely Article 20 and Article 21, cannot be suspended under any circumstances. Secondly, it introduced a requirement that any law enacted by the state during an emergency must expressly mention its connection to the proclamation of emergency. Laws passed without this declaration are deemed unenforceable. Moreover, even during an emergency, the enactment of laws without proper declaration can be challenged in a court of law. The case of *ADM Jabalpur v. S. Shukla*, where the Supreme Court ruled that individuals could not approach the court for violations of the "Right to life," was widely criticized as being against the interests of the people. This judgment was seen as the court abdicating its responsibility to protect individuals' most fundamental rights. To prevent such situations in the future, the Amendment Act ensured that Article 20 and Article 21 cannot be suspended even during a state of emergency. If these rights are violated, individuals retain the right to seek recourse through the legal system.³³

This amendment represents a crucial step in ensuring the protection of fundamental rights, particularly in times of crisis. By safeguarding the rights enshrined in Article 20 and Article 21, individuals are granted essential protections against arbitrary actions by the state, preserving their dignity and freedoms even during emergencies. Additionally, the requirement for transparent and explicit declarations in the enactment of laws during emergencies enhances accountability and upholds the rule of law.

For revoking an emergency, when situations seem to get smooth then through another proclamation by the president the emergency can be revoked. Also, a meeting can be requisitioned of Lok Sabha with the presence of 10% of its members and in that meeting revoking of emergency can be decided by a simple majority. This method is recommended by the 44th Amendment of the Constitution.

33 <https://www.juscorpus.com/wp-content/uploads/2021/08/86.-Simran-Shadija.pdf> accessed on 11th April,2024

JUDICIAL REVIEW

Previously, the declaration of a National Emergency was shielded from judicial review, meaning that courts could not challenge its validity. However, this provision underwent a significant change with the passage of the 44th Amendment Act of 1978. This amendment altered the legal landscape, allowing for judicial scrutiny of National Emergencies.

A landmark case in this regard is *Minerva Mills v. Union of India* (1980), where the Supreme Court asserted the judiciary's authority to review the legitimacy of a presidential proclamation of emergency under Article 352(1). In its ruling, the Court emphasized that there should be no barrier to the judicial review process when assessing the grounds on which the President bases their satisfaction in declaring an emergency.

This decision marked a crucial shift in the balance of power, granting the judiciary the ability to scrutinize the executive's actions during emergencies. Now, the courts have the authority to examine whether the President's satisfaction in proclaiming an emergency is founded on valid and legitimate grounds. This ensures that the executive's exercise of emergency powers remains within the bounds of the Constitution and is not abused for political purposes.

By allowing for judicial review of National Emergencies, the Supreme Court upheld the principle of checks and balances, safeguarding against potential misuse of emergency powers. It reinforces the judiciary's role as a guardian of constitutional rights and ensures accountability in times of crisis. Overall, the *Minerva Mills* case represents a pivotal moment in India's legal history, strengthening democratic norms and protecting individual liberties even in the face of national emergencies.

In *Makhan Singh v. State of Punjab*³⁴, under the Defence of India Act, 1962 Makhan Singh was detained with many others. They challenged the case in HC for detention under the same act. The fact was raised that their detention was illegal and improper because the laws and rules stated in the detention act are violative of FR's articles 14, 20, and 21. The HC dismissed the petition

³⁴ *Makhan Singh v State of Punjab* AIR 1964 SC 72, 83

³⁵ Constitution of India, article 14, 20 and 21

stating that the presidential order does not permit courts to entertain such petitions. The same appeal was filed in SC and the court examined the extent and scope of presidential order under the ambit of article 359. The court observed that the Fundamental rights are theoretically alive. In case of any infringement of a right, only the right to seek remedy is suspended. Suspending the fundamental right is not confined only to SC. Any court having jurisdiction under Article 226 can do so.

JUDICIAL INTERPRETATION OF EMERGENCY PROVISIONS

Article 356 of the Indian Constitution pertains specifically to state emergencies, although it is part of the broader provisions related to emergencies. Dr Ambedkar included these provisions with the hope that they would remain unused, referring to them as 'dead letters'. Their activation would signify a failure of the state mechanisms, which cannot be taken lightly. This sentiment is echoed in judicial interpretations, exemplified by cases such as *State of Rajasthan v. Union of India* (AIR 1977 SC 1361) and *S.R. Bommai v. Union of India*³⁶, where 7 and 9 judges respectively ruled on the matter. The latter case, *S.R. Bommai*, builds upon the precedent set by the former³⁷. Clause 1 of Article 356³⁸ addresses the president's satisfaction upon receiving a report from the governor indicating the failure of the state government to function in accordance with the Constitution. The court has affirmed that the president, upon receiving such a report, must be satisfied that the situation warrants immediate action.

Article 74(1)³⁹ mandates the president to act on the advice of the council of ministers. Article 356(1) stipulates that the failure of the state government to adhere to constitutional provisions necessitates intervention.

36 *SR Bommai v Union of India* AIR 1994 SC 1918

37 Md Mustakimur Rahman, 'Fundamental Rights in Times Of Emergency: Ataur Rahman v Muhibur Rahman Revisited' (2018) 05 *Brawijaya Law Journal*

38 Constitution of India, art 356, cl 1

39 Constitution of India, art 74, cl 1

The dissolution of the legislative assembly, while not explicitly mentioned in Article 356, was clarified through the S.R. Bommai case. It established that the power to dissolve the assembly lies with the president, subject to approval by both houses of Parliament under Article 356(3). If disapproved, the assembly is reconstituted without any impact from the emergency proclamation. If the proclamation is challenged in court, Article 356(3) serves as a safeguard for federalism, allowing for interim orders to be issued until the matter is resolved. Overall, Article 356(3) serves as a protective mechanism for federalism within the Indian polity.

MALAFIDE DETENTION

The Supreme Court has clarified that whether a detention is mala fide or bona fide holds significant importance. If a person's fundamental rights are infringed due to detention, they have the right to approach the court and seek the writ of 'habeas corpus' if the detention is found to be mala fide. Other rights that have not been suspended by the President can also be enforced through legal proceedings in a court of law. In cases where a detained individual challenges the Defense of India Act or ordinance, alleging disproportionate delegation of power, such pleas cannot be barred by the presidential order suspending fundamental rights. This is because such pleas are not explicitly addressed in the order regarding fundamental rights.⁴⁰

SARKARIA COMMITTEE

The committee discussed in Chapter 6 analysed the usage of Article 356, noting that it has been invoked more frequently than anticipated, despite initially being expected to remain unused. The responsibility or authority of the central government to restore representative governance in states is aided by public support. Article 356 has been utilized multiple times for the proclamation of presidential rule. Formed in 1983, the committee took four years to address and improve center-state relations. In its initial report, the committee recommended that Article 356 should only be employed in exceptional circumstances. Article 355 mandates that the government ensures the security and well-being of the state. However, the failure of a

40 V Maya Krishnan, 'EMERGENCY AND PERSONAL LIBERTY' (1966) 8 Journal of the Indian Law Institute <<https://www.jstor.org/stable/43949912>> accessed on 12th April, 2024

constitutional provision, regardless of its importance and impact, should not be equated with a failure of constitutional machinery. After considering various recommendations and suggestions, the committee concluded that Article 356 should be invoked only when all other measures fail to rectify the malfunctioning of constitutional machinery. The Sarkaria Commission report has tried to remove the ambiguity present in the wording of Article 356 by explaining the Failure of Constitutional Machinery and giving illustrations of improper invoking of Article 356. It has explained the application and use of this Article.

Failure of constitutional machinery – The concept of "Failure of Constitutional Machinery" encompasses four scenarios. Firstly, it occurs during a political crisis when, following general elections, no government can be formed, or if the existing ministry resigns or loses its majority without any alternative available, necessitating the imposition of an emergency. Secondly, internal subversion leads to a failure of Constitutional Machinery when a state government deliberately disrupts Constitutional provisions or employs its authority for unconstitutional purposes. Thirdly, a failure of Constitutional Machinery due to physical breakdown arises when a government is unable to address internal disturbances or natural disasters that incapacitate state administration or threaten state security.

The Commission emphasized that if a state government fails to adhere to directives issued by the Union government, and such non-compliance adversely affects Centre-state relations, it constitutes a failure of Constitutional Machinery.

Improper Invocation of Emergency –

After analysing the Sarkaria Commission report, improper invocation of Article 356 can be categorised into 5 categories: “1. Non-issuance of Warning to Errant State, 2. Dismissal of Ministry Commanding Majority, 3. Denial of Opportunity to Claimant, 4. Non-formation of Caretaker Government and 5. Wholesale Dissolution of Assemblies.”⁴¹

An admonition should be issued to errant states as a precautionary measure, as Article 356 is reserved for extreme situations, and imposing an emergency without prior warning would

41 Sarkaria Commission Report 1987, Ch VI

constitute misuse of this provision. However, a warning can be skipped if immediate action by the Union is imperative. The commission's analysis revealed that most instances of misuse were aimed at resolving intra-party disputes. This includes scenarios where a majority-holding government is dismissed solely on grounds of corruption or maladministration, or when the governor declares that the party has lost its majority without providing the ministry an opportunity to prove its confidence through a floor test.

Another category of misuse occurs when opportunities for government formation or demonstrating majority support are denied to the concerned parties, such as after elections or when alternative governments are not allowed to be formed. Additionally, failing to establish a caretaker government also constitutes misuse.

The most egregious misuse of Article 356 occurred in 1977 and 1980 when seven legislative assemblies were dissolved simultaneously on two occasions. This wholesale dissolution of assemblies was termed as a clear abuse of the provision for political reasons, as the emergency was invoked due to ideological differences between state and central governments.

RECOMMENDATIONS MADE BY THE COMMISSION

The commission proposed eight safeguards and four amendments to enhance the provisions of Article 356. Among the safeguards, it emphasized treating Article 356 as a last resort after exploring all possible alternatives. It recommended issuing a notice to the errant state as a precautionary measure.

The commission highlighted the governor's responsibility to exhaust all possibilities of forming a government enjoying majority support. If this is not feasible and fresh elections can be conducted promptly, the outgoing ministry should be asked to continue as a caretaker government. One of the key safeguards suggested was that every proclamation under Article 356 should be presented before each house of Parliament promptly, ideally before the expiration of the two-month period stipulated in Article 356(3).

Regarding amendments, the commission proposed that the assembly should not be dissolved under Article 356(1) without being presented before Parliament. Additionally, it recommended incorporating changes to ensure that judicial review against mala fides is more effective. This

includes making the material facts and grounds on which presidential satisfaction is based an integral part of the proclamation.

OVERVIEW OF MISUSE OF POWER

The Constitution of India establishes a federal structure with a bias in favor of the Center, while granting states supremacy within their allotted spheres. This balance between the Center and the States, as defined by the Constitution, is crucial for preserving the nation's integrity and spirit. Article 356, rather than undermining state autonomy, is essential for maintaining this federal structure. The usage of Article 356 has varied over time. According to a RTI reply from the Ministry of Home Affairs (MHA), Presidential rule has been imposed 115 times till 2016. The frequency of its use increased significantly over the years, particularly during political upheavals. However, after recommendations from the Sarkaria Commission and rulings like the S.R. Bommai case, its misuse has gradually decreased.

While emergency situations may justify the use of Article 356, many instances remain controversial, with misuse evident in over half of the cases⁴². Deleting the Article entirely would lead to drastic changes in Center-State relations, which the nation may not be prepared for. Instead, amendments should be made to ensure its correct usage.

Regarding judicial review, landmark cases such as *State of Rajasthan v Union of India* and the subsequent removal of the absolute exclusion of judicial review through the Constitution (44th Amendment) Act, 1978, have established that Article 356 is not immune to judicial scrutiny. Post the Sarkaria Commission and Bommai case, abuses of Article 356 have significantly decreased.

In cases like *C.R. Das v UoI*⁴³ and *Rameshwar Prasad v Union of India*⁴⁴, the courts emphasized the need for genuine and cogent grounds for imposing emergency, although the path to preventing misuse has been complex.

42 Government of India, Ministry of Home Affairs, 'President's Rule' (Factly.in, 3 May 2016)

<<https://factly.in/wp-content/uploads/2018/06/MHA-Presidents-Rule.pdf>> accessed on 12th April, 2024

43 C R Das v Union of India AIR 1999 Pat 221

44 Rameshwar Prasad v Union of India (2005) 7 SCC 149

An unconventional misuse of Article 356 occurred during the Godhra train incident in Gujarat in 2002, where the Union government refrained from invoking an emergency despite a breakdown in constitutional machinery. This highlights the importance of ensuring appropriate decisions are made by the President in such situations.

In summary, while Article 356 is crucial for addressing emergencies, its misuse remains a concern. Efforts to prevent abuse, coupled with judicial oversight, are essential for maintaining the integrity of the constitutional framework.

LANDMARK CASES

- In 1966, the Supreme Court talked about the person's right to move to court in the case of *State of Maharashtra v. Prabhakar*⁴⁵. In the case, SC ruled that if one's right is abridged not under any presidential order or defence of India act, then the person has full right to approach the court for seeking a remedy.
- In *Ram Manohar Lohia v. State of Bihar*⁴⁶, the court held detention under detention of India to be invalid because the detention was against the circumstances laid down in the rules. Here, the power to detain was delegated by the government to the district magistrate under the Defence of India Act, of 1962, district magistrate detained Mr. Manohar. It was stated in the order that it was necessary to detain him in order to prevent him from violating the law and order. The court held that, if a person's FR is violated then he still has the right to move to court under the Defence of India Act, and his petition was heard. The court was satisfied that he was wrongfully detained and it could be challenged.
- SC in *Mohd. Yaqub v. State of Jammu and Kashmir*⁴⁷ held that under art. 13(2) of the Constitution defines, any order made under art. 359(1) is not "law". Therefore, such orders cannot be enforced in case they violate the FR's and also said if article 14 is

⁴⁵ *Maharashtra state v Prabhakar* AIR 1996 SCC (3) 463

⁴⁶ *Ram Manohar Lohia v State of Bihar* AIR 1966 SC 740

⁴⁷ *Mohd Yaqub v State of Jammu and Kashmir* AIR (1992) 4 SCC 167

suspended then this is itself a violation of art. 14. The court overruled its past judgement of Ghulam Sarwar v. Union of India.⁴⁸

- Supreme Court in A.D.M. Jabalpur v. S. Shukla⁴⁹, here in the case, respondent challenged the emergency declared by the president under art. 352. Under the 'Maintenance of Internal Security act,' the respondents were detained. The court held that for writ petition of Habeas Corpus under art. 266, no person has the locus standi to move to the court. The respondents in the same case presented a contention before Supreme Court that Art 21 is a source right to life and personal liberty and one can move to the court in the case, they are suspended but the SC rejected the contention on the grounds that once the right to judicial remedy is suspended for art. 21 that person cannot move to the court to seek any form of remedy. Same as the above-mentioned, article 359(1) does not only suspend one's right under art. 32 to move to the SC but also to HC under art. 266. This judgment was highly criticized as it took all the protection granted under Constitution. To counter this judgment, the 44th amendment was brought. This amendment inserted the part that article 20 and 21 cannot be suspended even under article 359(1).

CONCLUSION AND SUGGESTIONS

The historical relationship between fundamental rights and the provisions of emergency in India has been marked by ambiguity and uncertainty. Fundamental rights are considered essential for leading a life with dignity and fostering individual development. They are enshrined in the Indian Constitution to ensure that every citizen can enjoy them. However, these rights are suspended when a state of emergency is declared by the president, which is a grave and significant action taken in response to disturbances within the country.

During normal circumstances, individuals have the right to seek recourse in court under Article 32 of the Constitution. However, this right is suspended during an emergency, and all fundamental rights are nullified upon the proclamation of emergency. Previously, even Article 20

48 Ghulam Sarwar v Union of India and Ors AIR 1967 SC 1335

49 ADM Jabalpur v Shiv Kant Shukla AIR 1976 SC 1207

which safeguards against exploitation, was suspended until the 44th amendment rectified this issue. In my view, suspending Article 20, which protects against exploitation, could lead to severe repercussions, as it may empower individuals in positions of authority to exert control over others. Therefore, in the interest of national security, such a fundamental right should not be infringed upon.

The Indian judiciary, to some extent, closed its doors to providing justice to the people in situations where their fundamental rights were violated. This issue was addressed by the 44th amendment act, which suspended all fundamental rights except for Articles 20 and 21. Consequently, the Supreme Court affirmed that regardless of the circumstances, individuals have the right to seek recourse in court if their fundamental rights, as outlined in Part III of the Constitution, are violated.

The authority granted to the Centre by Article 356 plays a vital role in upholding the essence of the Constitution. Therefore, removing this provision is not a viable option. Research and analysis indicate that it has often been exploited for political motives. The government at the Centre, typically wielding a majority in Parliament, can easily approve the proclamation and invoke a State Emergency in any state, owing to the lack of clear guidelines and safeguards, leading to its misuse. States have endeavoured to assert their rights whenever possible. The power vested in Article 356 is significant as it disrupts the normal functioning of democracy, emphasizing the need for caution before exercising such authority. While various commissions have proposed safeguards to prevent misuse, their effectiveness depends on proper implementation.

Notably, both the State of West Bengal⁵⁰ and a committee formed by the State of Tamil Nadu have called for the deletion of Article 356. However, repealing this Article is not feasible as its utilization is indispensable in certain circumstances. Democracy would be at risk without it. Various attempts were made to prevent the misuse and but only after Sarkaria Commission and Bommai case, the situation started to get better. Their contribution is extremely valuable.

The court also demonstrated that nothing is immune from judicial review and the Judiciary has

50 West Bengal Government Document of 1 December 1977 (West Bengal Memorandum), para 10

the power to provide a remedy. In more than one case, the court prevented the misuse and showed that judicial review is a principle to be reckoned with. Lastly, Article 356 is an essential part of the Constitution and it is the obligation of the executives to exercise their power in consonance with the Constitution.

Ultimately, the efficacy of any legislation hinges entirely on its diligent enforcement in the correct context. Regardless of how exemplary and meaningful a law may be, it cannot fulfil its intended purpose or avoid controversy unless it is implemented in both its literal and intended essence.

Hence, it can be concluded from the research that both the hypothesis, “During states of emergency in India, there is a significant erosion of civil liberties and fundamental rights, as evidenced by increased government surveillance, censorship, and restrictions on freedom of speech and assembly.” and “Emergency provisions in India have been frequently misused by the executive branch for political gains, leading to the suppression of dissent, curtailment of civil liberties, and violations of fundamental rights.” stand true.