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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

EMERGENCY PROVISIONS AS INSTRUMENTS OF CONSTITUTIONAL EXCEPTIONALISM

AUTHORED BY - SREERUPA S.,
K SUBBA RAM REDDY, & DR. SAJI SIVAN S

ABSTRACT

The declaration of emergency is one among the most significant constitutional tools of India that has given outstanding authority to the Union Government to protect sovereignty, integrity, and unity under circumstances of national limits. The constitutional framework of the emergencies in this research paper is discussed under Articles 352, 356, and 360¹ and the difference between national, State, and financial emergencies is elucidated. It follows the history of such provisions in all their development with a focus on the three emergencies declared in 1962, 1971 and 1975² and critically analyzing the political, legal and socio-economical implications of these declarations. The analysis would look at the judicial interpretation to the landmark cases that have been developed and the procedures that are set in policy to help curtail the misuse of emergency power that might arise. By placing an emphasis both on the need to have such powers and on their inherent risks, the study examines the thin line that exists between guaranteeing of national security and the maintenance of the democratic freedoms.

keywords: Article 352, public emergency, national emergency, State emergency, financial emergency, Article 356, Article 360, 44th Amendment, fundamental rights, federalism, judicial review, India.

I. INTRODUCTION

The proclamation of a public (national) emergency in India is one of the most significant powers provided by the Indian Constitution to protect the unity, integrity, and security of the nation during extraordinary situations. These provisions are listed in the Constitution, mainly under Part XVIII (Articles 352 to 360), and have been invoked a few times in the history of

¹ The Constitution of India, Part XVIII.

² Granville Austin, *Working a Democratic Constitution* (1999) or D.D. Basu, *Introduction to the Constitution of India*.

independent India.

II. CONSTITUTIONAL PROVISIONS

Article 352: National Emergency

A National Emergency can be proclaimed by the President of India if he/she is satisfied that the security of India or any part thereof is threatened by war, external aggression, or armed rebellion.

Initially, the term used was "internal disturbance," but it was replaced with "armed rebellion" by the 44th Constitutional Amendment Act, 1978³.

A proclamation of emergency may be made even before the actual occurrence of war, external aggression, or armed rebellion, provided there is an 'imminent danger'

Article 356 – Provisions in case of failure of constitutional machinery in States (State emergency)

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 assume to himself the functions⁴ of the Government of the State.

Article 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 any part of the territory thereof is threatened, he may by Proclamation make a declaration to that effect.

Procedure for proclamation of emergency:

Under the Constitution, the President may declare an Emergency only on the Union Cabinet's written advice. The proclamation must be approved by Parliament within one month, else it lapses. Once approved, it lasts six months and may be extended further with parliamentary sanction. The Lok Sabha can revoke it by passing a resolution of disapproval, and the President may also withdraw it anytime.

³ 44th Constitutional Amendment Act, 1978.

⁴ *State of Rajasthan v. Union of India*, (1977) 3 SCC 592.

A State Emergency (Art. 356) lasts six months, extendable with a two-thirds majority, but not beyond three years except when a National Emergency is in force or elections cannot be held as certified by the Election Commission. A Financial Emergency (Art. 360) requires parliamentary approval within two months and continues until revoked.

These provisions create a structured system of crisis management, balanced with Cabinet accountability, parliamentary control, and judicial review.

Historical Background: National Emergencies in India 1962 – Sino-Indian War

Proclaiming the first National Emergency in India in 1962⁵

was under the guidance of President Dr. Sarvepalli Radhakrishnan, on the recommendation of the late Prime Minister Jawaharlal Nehru and his cabinet. It is in response to the invasion of the Chinese troops into Indian territory which was under Indian control in the northern borders thus creating an imminent threat to national security. The statement that was declared granted the central government broad powers such as suspending fundamental rights and overseeing the administration in the state to provide a rapid and decisive reaction against the external aggression. The initial enacted emergency regime lasted until the war between Indo-Pak in 1965 and was eventually lifted in 1968.

1971 – Bangladesh Liberation War

The National Emergency in the year 1971 was proclaimed on 26 December 1971⁶, when the president V. V. Giri advised under the recommendation of the Prime Minister Indira Gandhi as to the implementation of the Article 352 of the Indian Constitution. What triggered the step was the re-deployment of the troops by Pakistan in East Pakistan in the Bangladesh Liberation War. Massive migration of the refugees of East Pakistan into India and ever open conflict between the two nations made the government to resort to emergency measures to secure the national security. Just as the case was in the year 1962, the measure resulted in a temporary halt in some civil liberties and an increase in the powers of the centre. Despite the end of hostilities after several weeks, the emergency was not repealed until 1977, which now was the fourth period of emergency in history, thus, extending the second period with it.

⁵ *Government of India Notification, 1962 Emergency Proclamation.*

⁶ *Proclamation of Emergency, Gazette of India, 1971.*

1975–1977 Internal Emergency (Internal Disturbances)

Later on, the same night of 25 June 1975, President Fakhruddin Ali Ahmed was ordered by Prime Minister Indira Gandhi to proclaim the third national-emergency in the history of India, the most controversial one. Unlike the previous emergencies that were caused by war or other external aggression, this was conditioned as an answer to the threat of internal disturbances. Politically, there was an increased protest against the Indira Gandhi government, a supreme court ruling which declared her re-election as unconstitutional, and The National Emergency declared in 1975 by Indira Gandhi based on the ground of internal disturbance constituted the lowest point in Indian democracy. It included mass arrests, press control and suspension of civil liberties, that were primarily to attempt to hang on to power following the Allahabad High Court⁷, that overturned the election of Indira Gandhi. It came to its end in 1977 where the Janata Party was put to power followed by the subsequent reforms through the 44th Amendment.

The National Emergency declared in 1975 by Indira Gandhi based on the ground of internal disturbance constituted the lowest point in Indian democracy. It included mass arrests, press control and suspension of civil liberties⁸, that were primarily to attempt to hang on to power following the Allahabad High Court, that overturned the election of Indira Gandhi.

S. R. Bommai vs. Union of India (1994), the constitution asserted that the centre must have flexible control of national affairs, to gain an upper hand over the propaganda of regional nationalism. The Supreme Court said that President Rule is subject to judicial examination, legislative majority has to be put into test on the floor and this cemented federalism.

Article 360 (Financial Emergency) has never been used⁹. Rather than using the idea of the Financial Emergency, the government opted to implement reforms, inflow of foreign funds, and other support measures in the form of welfare during the economic crisis in 1991 and the outbreak of COVID-19 fiscal austerity in 2020 because it is politically sensitive.

Nevertheless, its existence makes the country constitutionally ready to handle severe economic situations. The constitution asserted that the centre must have flexible control of

⁷ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

⁸ *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

⁹ *India Budget 1991 Reforms or Ministry of Finance, Government of India reports.*

national affairs, to gain an upper hand over the propaganda of regional nationalism. the Supreme Court said that President Rule is subject to judicial examination, legislative majority has to be put into test on the floor and this cemented federalism.

III. IMPACT ON FUNDAMENTAL RIGHTS SUSPENSION OF ARTICLE 19¹⁰ DURING NATIONAL EMERGENCY

Several fundamental rights are also substantively limited when there is a National Emergency as per Article 352 of the Indian Constitution. Of these, Article 19 is first, which guarantees rights to freedoms of speech and expression of opinion, assembly and association, movement, residence, as well as occupation. Under such an emergency decree, the procedural safeguards usually imposed under Articles 13 and 226 can be waived and the state can regulate--or may delete entirely--the rights listed in Article 19 without engaging in constitutional litigation it might lose. Running parallel to this is Article 359 which allows the President the power to leave judicial review to challenges made on fundamental rights and has the effect of leaving the executive immune to court checks during emergency times. Most critically, the scheme does not abolish the material rights themselves, but only annihilates their procedural vehicle by which they are otherwise usually vindicated.

When situations that are out of the ordinary occur, chances are that the amendment of the constitution has been used to cater to these extraordinary situations and the 44th amendment of 1978 has been one such circumstance. The 44th Amendment, enacted in response to a judicial invalidation of the emergency powers in the 1975 Emergency offered major curbs against the abuse of the emergency powers. It is important to note that it made the provisions that in an Emergency, Articles 20 and 21 could not be suspended. Article 20¹¹ protects citizens in the following ways: bars conviction under ex post facto laws, bars double jeopardy, and bars self-incrimination whereas Article 21 guarantees the right to life and liberty of individual person. The Amendment made these provisions non-derogable; therefore, the State is not allowed to deprive a person of life or liberty without adhering to a procedure prescribed by law, even under the severest emergencies. So, even though the Constitution allows restrictions prior to protect the country during the crisis time of the

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¹⁰ *Makhan Singh v. State of Punjab*, AIR 1964 SC 381.

¹¹ *44th Constitutional Amendment Act, 1978*.

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IV. STATUS OF INDIA THREE YEARS PRIOR TO THE DECLARATION OF NATIONAL EMERGENCY

Before the national emergency was declared in India, there had been a long-term worsening of the situation with the relation towards the People Republic of China. The 1959 Tibetan uprising that worsened the diplomatic situation as well as the frequent border skirmishes along the Himalayan border that led to the SinoIndian War in 1962 were two key events to

this process. Leading up to the emergency in 1971, India was facing several issues both at home and abroad, one of the major problems being domestic inflation and food shortages on a large scale; a rising political furor in the form of labour strikes and populist movements; and a near breakdown of political sanity in East Pakistan, now Bangladesh where political turmoil had caused a huge refugee flow and border clashes with Pakistan. The three-year period up to the 1975 emergency saw India experience yet another fierce economic dislocation along with the agricultural sector being affected due to the droughts coupled with global oil shock which caused high rates of inflation and unemployment; escalated political unrest through a national railway strike and student protests; and the questionable use of the Maintenance of Internal Security Act on civil protestors. Peak of these external security threats and domestic imbalances came the judicial crisis triggered by the Allahabad High Court decision that knocked out the 1969 election of Prime Minister Indira Gandhi, which stimulated demands by sections of the opposition led by Jayaprakash Narayan that she quit office. All these pressures combined established the justification of the implementation of emergency rule by the Indian government on both occasions.

V. CASE LAWS:

A.D.M. Jabalpur v. Shivkant Shukla (1976)¹²

This case which was popularly known as the Habeas Corpus case. In the 1975-77 Emergency, most contended that, as long as a national emergency existed similarly to the situation with respect to Article 31 (2) the right of individuals to move court to enforce fundamental rights as guaranteed under Article 21 (including life and liberty) was in suspension. In this regard, unlawful or arbitrary detentions could not be reviewed in the court, which was a reminder of all-encompassing emergency powers into civil liberties.

Minerva Mills Ltd. v. Union of India (1980)¹³

it was held that emergency proclamations were subject to judicial review. By explaining that proclamations whose declaration is made out of mala fides or upon extraneous or irrelevant considerations are not legally valid, the Supreme Court upheld the doctrine of basic structure and put a limit to the amending powers of the Parliament even in the emergency situation and at the same time affirmed the judicial review over the decisions of emergency proclamations.

¹² ADM Jabalpur v. Shivkant Shukla (1976)

¹³ Minerva Mills Ltd. v. Union of India (1980)

Makhan Singh v. State of Punjab (1964)

discussed the suspension of the Article 19 in view of the national emergency. The Court ruled that the imprisonment of the petitioner was legal since it met the standards that were stipulated in accordance with Article 359(1). This also helped justify the power of the State in the context of emergency, and at the same time reminded the judicial inability of helping in this situation.

Indira Nehru Indira Gandhi v Raj Narain (1975)¹⁴

known as a fallout of electoral malpractice and the overturning of the election of then Prime Minister Indira Gandhi. By examining the constitutional amendments that were made during the emergency, the Court consolidated the limits of the legislative powers of the Parliament and secured judicial review as part and parcel of the Constitution

S. R. Bommai v. Union of India (1994)¹⁵:

The legal decision that is under the process is not just because of the President Rule of Article 356, the fact that the supreme court upheld that even an emergency proclamation under that provision can be challenged in the court. During this process, the Court enunciated the standards through which emergency powers can be used and was thus trying to contain their unilateral usage and, in the process, fostering a constitutional checks and balances.

VI. WHY INDIRA GANDHI DECLARED PUBLIC EMERGENCY:¹⁶

On 25 June 1975, Indira Gandhi declared a state of Public Emergency in India under Article 352 of the Constitution using the reasons mainly based on the existence of internal disturbances. The precipitating factor ¹⁷was the Allahabad High Court decision of 12 June 1975 concluding that Prime Minister had committed an electoral malpractice and overturning her 1971 parliamentary election win. Political climate was very volatile at the time. Indira Gandhi was pressured to resign by the opposition leader Jayaprakash Narayan who started a mass

¹⁴ Indira Nehru Indira Gandhi v. Raj Narain (1975)

¹⁵ S.R. Bommai v. Union of India (1994)

¹⁶ *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

Makhan Singh v. State of Punjab, AIR 1964 SC 381.

Indira Nehru Indira Gandhi v. Raj Narain, 1975 Supp SCC 1.

A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

Indira Nehru Indira Gandhi v. Raj Narain, 1975 Supp SCC 1.

S.R. Bommai v. Union of India, AIR 1994 SC 1918.

¹⁷

movement against the government. Poor economic conditions which were manifested by increased rates of inflation, unemployment, and food shortage were also a contributing factor to burning popular sentiment. Indira Gandhi and supporters claimed that such domestic disorders, along with the associated sense of threats to national security and continued democratic stability, necessitated the emergency action to bring order to the situation and further economic growth. Through the proclamation, the government was allowed to rule by decree, censorship of the press, arrest of political opponents, and extinguishing of the opposition.

Criticism and Abuse of Emergency Powers: It is only the President of India who can declare an Emergency, but only on the written advice of the Union Cabinet, and thus the decision-making of this choice is constituted by being collective and non-arbitrary. After proclamation, the proclamation has to be ratified by the Parliament within one month, otherwise it lapses automatically. When accepted it becomes valid only for six months and can be continued, again with the approval of parliament. The President is perfectly free to withdraw the Emergency and the Lok Sabha can do away with it with its resolution of disapproval which again puts an element of check on the power of the President.

A State Emergency according to Article 356 takes six months that may be extended by a two-thirds majority of the parliament but does not go anymore than three years unless a National Emergency is declared or a fact certified by the election commission that stated elections cannot be conducted. Financial Emergency under Article 360 must be approved by parliament in two months and stays in effect until it has been repealed.

These measures make the structure of crisis management organized, components balanced, which provide the Union government the ability to act decisively when the national security, internal order, or financial stability are threatened, but without reducing the accountability of the Cabinet, the oversight by parliament, and the judicial review to achieve the limitation of abuse of emergency powers and protection of democratic governance.

VII. WHY ARTICLE 20 AND 21 CAN'T BE SUSPENDED:

Section 20 and 21 of the Indian constitution contain an irreducible minimum that cannot be suspended in times of a national emergency as it plays a crucial role in protecting the fundamental human rights and in restraining the authorities to excesses. Article 20 prevents

the retroactive application of criminal law, repeated criminal trials and forced self-incrimination, whereas Article 21 ensures the right to life and liberty of the person. Clearance of the emergency period the 44th Constitutional amendment Act (1978)¹⁸, was necessitated by the experience of serious violation in 1975-77 Emergency during which these rights were suspended and thousands of people were detained without trial, to make it clear nothing could override the rights laid down in the Articles 20 and 21 and that these could not be denied even during an emergency. This clause makes it certain that none of the governments can deny a person his life or liberty without following a set of due legal proceedings or prosecute citizens in a haphazard way and uphold the idea of justice, human dignity and rule of law as the foundation of the Indian Constitution.

VIII. CONSTITUTIONAL SAFEGUARDS AND 44th AMENDMENT:

In case the 1975 Emergency excesses were repeated, Part XVIII was amended by Parliament via the 44th Amendment to add new safeguards on Emergency powers. Article 352, which created a vague term, namely, internal disturbance, was changed to armed rebellion, where the evidence of a real threat to security had to be provided. Procedurally, a Proclamation could only now be issued on the written suggestion of the Cabinet which was subject to accountability and judicial inquiry by virtue of Article 32. The role played by Parliament also gained some power: an Emergency could not be in operation more than 30 days unless both Parliament Houses approve of it and after this term, it needs to be renewed at a special majority every six months. The Lok Sabha was further vested with powers to withdraw¹⁹ a Proclamation by means of a disapproval resolution when, the President could dismiss the Proclamation at any time. What was restrained most significantly was the suspension of Fundamental Rights. Article 358 would no longer be applicable in armed rebellion cases, and would only be used in situations Dar in case of the wars or outside aggression, where civil liberties in the domestic state of emergency would be upheld. Article 359 was amended so that Articles 20 and 21 became non-derogable, and, in an Emergency, protection against infringement of life, liberty or fair procedure in a criminal proceeding was guaranteed by Article 21. These reforms were specifically meant to sort out the constitutional vacuum revealed in *ADM Jabalpur v. Devised* by Shivkant Shukla in a bid to forestall Emergency power abuse.

¹⁸ *4th Amendment, Statement of Objects and Reasons.*

¹⁹ *Constitution of India, Article 352 (as amended).*

IX. CONCLUSION:

The Emergency, called out by Prime Minister Indira Gandhi (1975- 77) is a bright example of how the constitutional provisions in the name of national security can be used to get political mileage. Court judgments against Indira Gandhi and an increasing resistance triggered the proclamation which allowed her government to stabilise authority in the name of bringing order. Fundamental liberties were suspended, political opponents were detained, the press was censored and any opposition was struck down. What was meant as a guardrail of a constitutional strategy became an instrument of the centralization of power and negation of democratic freedoms. This era showed the weakness of constitutional protection against the politicizing tendencies. It undermined the system of separation of powers, restrained judicial independence and curtailed civil liberties to a great extent. History shows that under a weak set of checks; emergency powers may be applied in ways which do not serve the interests of the community but meet the needs of selfish politics. An effective counter-reaction was part of the 44 th Constitutional Amendment (1978) which limited the application of emergency powers and brought more protection of fundamental rights even in times of emergency. The case is a historical cautionary tale²⁰ of how the power of democracy and the discourse must be guarded by an informed judiciary, a vibrant civil society and constitutional vigilantes to ensure authoritarian tendencies are not given an inch. The Emergency highlights the importance of having the democratic institutions guarded against the unregulated political actions.

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