

EMERGENCY PROVISION IN INDIA – A DOCTRINAL RESEARCH***Asmit Chitransh***

Symbiosis Law School, Hyderabad

Ishani SinghCollege of Legal Studies,
University of Petroleum and Energy Studies, Dehradun

Emergency is the extreme situation when the constitutional machinery of the nation fails to that level which cannot be controlled by the democratic government or there is a severe threat on the nation or any part of the territory which can also be financial in nature, at that point of time the President of India takes the ultimate call and proclaims an Emergency. Being a democratic nation emergency provision in India has been subject to a lot of debate and discussion as the ultimate control goes to one single authority. The paper talks about the historical development of emergencies in India and also the types of emergency provisions in India. The need to declare emergency, is it justified? What are the pros and cons of emergency? Since there is always the other side, what is the reason that the area is still debated over? These topics are dealt in this paper taking reference of relevant case statutory provisions, case laws, journals and research articles. The paper concludes with certain sets of suggestions and recommendations that can be followed to combat problems in future.

Keywords: Emergency, Pros, Cons, Types of Emergencies, Article, Indian Constitution

INTRODUCTION

“Emergency” under the constitution means a situation which is not normal a situation which calls for urgent remedial action.¹

¹Rameshwar Prasad (VI) v. Union of India (2006), 2 SCC 1 : AIR 2006 SC 980

If we go by the dictionary meaning of the word “Emergency” then it says that it is a situation which poses an immediate risk and requires urgent attention or ‘as a failure of constitutional system to deliver reasonable conditions of life..’²It is mandatory for the government to be prepared with all required measures to safeguard its people from any kinds of crisis. Hence, the Government has been conferred powers to be prepared for any such situations before it arrives. Even in the ancient times the principle of necessity was well recognized had played a significant role.

India being a democratic nation, when reaches to such severe crisis situations cannot deal with them in its normal process since it needs immediate action and therefore the president is given the authority to proclaim emergency after he is satisfied after discussion and advice with the council of ministers that it is the need of the hour. But that is the time when the president is the only controlling authority and being a democratic state, it creates the assumption of extraordinary powers in the hands of the president will be in derogation³ of the civil and political rights normally ensured to the citizens by the democratic situations. That is the reason why it is a topic of debate and discussion.

During emergency, all the fundamental rights of a citizen or an individual are suspended, except Article 20 and 21 where Article 20 talks about certain rights which include protection in respect of conviction for certain offences and these protections include ex-post facto law⁴, double jeopardy⁵ and right against self-incrimination⁶. Article 21 talks about Right to Life and Personal Liberty wherein every individual from its very birth has a right to live a meaningful and dignified life. The object of the fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law. Right to life means the right to lead meaningful, complete and dignified life. The fundamental rights are one of the pillars of the Indian Constitution Article 21 being core and since then these rights constitute the basic structure so they cannot be distorted or deprived off, therefore the doctrine of waiver exists which says that a person cannot be give up his/her own fundamental rights. In a situation like emergency since it is already a situation difficult to handle these rights seize temporarily which revive once the proclamation period ends.

²Black Law’s Dictionary.

³The provisions for derogation in the International covenants on human rights are being fully dealt within the Author’s forthcoming work on ‘Human Rights’.

⁴ Article 20(1) - No person shall be convicted of any offence except for violation of the 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.

⁵ Article 20(2) - No person shall be prosecuted or punished for the same offence more than once.

⁶ Article 20 (3) - No person accused of any offence shall be compelled to be a witness against himself.

Part XVIII of the Constitution of India talks about the Emergency Provisions under Article 352 to 360. Whenever there is a threat to the nation or any part of the territory OR there is a failure of the constitutional machinery OR the financial credibility of India is threatened, then as per the satisfaction of the President of India emergency can be declared in India. There are different procedures via which the emergency is declared in the nation. These procedures are discussed further in the paper. The authors tried to answer one more question in the paper, which is 'Whether the existing Emergency Provisions are sufficient to deal with the situation like armed rebellion, war or external aggression?'

Types of Emergencies in India (In a Nutshell)

In India, there are three types of emergency situations recognised by the constitution. As and when there is a need of the hour and upon satisfaction of the President in different situations emergency declared in India. The cases are mentioned below:

- First case where security of India is threatened by reasons of a war or external aggression or internal armed rebellion also be termed as '**National Emergency**'. The President can impose such emergency under Article 352 of the Indian Constitution, 1950, even before the actual crisis has broken which means on being suspicious of such circumstance and on advice and discussion with the council of ministers if he is satisfied he can do so. The duration of first such proclamations⁸ was from October 26, 1962 to January 10, 1968 in view of the Chinese aggression against the territory of the nation in the North-East region. For the second time, it was declared on 3rd December 1971 and it lasted till 21st March 1977 which was during the India-Pakistan War. Hence, it was declared due to the external aggressions. For the third time, National Emergency was declared in India due to the 'internal disturbances' (then internal disturbance now termed as armed rebellion⁹). It was declared on 25th June 1975 during the Government of Indira Gandhi which took place because of operation Blue Star.
- Second case is when the constitutional machinery of a state fails. It is the duty of the Union to maintain the smooth functioning of the constitutional machinery. Article 356 is used as a 'Yellow Card', which is a warning to the erratic state. When the Governor of the state is satisfied that the state's constitutional machinery has failed and there is no other resort to it, then he sends a report to the president after which the president consults with his council of ministers and finally proclaims emergency. After the Proclamation, the State's legislature is suspended, and president being the highest executive authority handles it (except for those powers that are vested with all

⁷ Taken from Article 352 of the Indian Constitution, 1950

⁸ An act that formally declares to the public that the government has acted in a particular way. A written or printed document issued by a superior government executive, such as the president or governor, which sets out such a declaration by the government.

⁹ After the 44th Amendment, the term 'Internal Disturbance' was replaced with 'Armed Rebellion'.

- the High Court). That is why such a situation is known as ‘**State Emergency or President’s rule in the State**’¹⁰. State Emergency was declared in Punjab for the first time, and recently the State emergency was declared in Utrakhand and Arunachal Pradesh. Before these two states, Jharkhand was under the rule of the President of India. All the states in India, except Chhattisgarh and Telangana, have been under a state of emergency at some point of time. In the case of *S. R. Bommai v. Union of India*¹¹, the Apex Court held that the court possesses the power of Judicial Review enabling them to look for the substantial grounds, the relevancy and the mala fide intentions (if any) behind the proclamations of a State Emergency.
- Third case is when the financial stability or credit worthiness of the nation is threatened. In such cases the President has the power to declare a reduction (partially or wholly) in the salaries and allowances of the Government Employees, including the Judges of Supreme Court and the High Courts. So far, this kind of emergency known as the ‘**Financial Emergency**’¹² has not been evoked in India. This emergency is defined under Article 360 of the Indian Constitution.

The duration of the Emergency Proclamation is initially for a period of two months, and if the Parliament fails to extend the term of emergency within that period, then the period is extended automatically for one month, but if the Parliament extends the period of emergency within that duration, it can do so for another period of six months, and two more such extensions can be made thereafter. The Election Commission has to certify the difficulty in holding elections in the event that the period of Emergency is sought to be extended beyond a period of one year on the grounds of a Constitutional breakdown. This can be done for a maximum period of three months.

National Emergency shall be imposed by the President based on a report submitted by the Council of Ministers headed by the Prime Minister. If the President is satisfied from the report that there is a need to declare emergency then it shall be declared. Article 352 is a protective action to avert or to meet grave and imminent danger for the existence of the Union or any part of its territory. Article 352 gives no authority to suspend the Constitution in a State. The State Governments and Legislatures continue to function normally and exercise the powers assigned to them under Constitution. What exactly happens is that the Centre (Union) gets concurrent power of legislation in State matters and it can make the states follow an all-India uniform policy. Under Article 352, during National Emergency all the fundamental rights of a citizen are suspended except Article 20 and 21. Article 359 of the Indian Constitution gives the President of the nation such powers that he may

¹⁰ Taken from Article 356 of the Indian Constitution, 1950

¹¹ AIR 1994 SC 1918

¹² Taken from Article 360 of the Indian Constitution, 1950

suspend the right to move to the courts for enforcement of fundamental rights¹³ during the time of emergency.

State Emergency or President's Rule can be invoked after a receipt of report submitted by the Governor of a state to the President. Though Article 163(1) obliges the Governor to act according to the advice tendered by his Council of Ministers excepting those matter with respect to which the Constitution requires him to exercise his discretion, and because the furnishing of a report under Article 356(1) is not so mentioned by the constitution as a function to be exercised by him in his discretion, it is obvious that in the matter of the Governor reporting to the President that there has been a breakdown of the Constitutional machinery must necessarily be a matter in which the Governor cannot possibly act according to the advice of the Council of Ministers.¹⁴ The reason is that as a result of such report, if adverse, the State Government itself would be suspended, so that the Governor's Council of Ministers cannot be expected to sign their death warrant. In the result, in making a report under Article 356(1), the Governor acts in his discretion, and as an 'agent' of the President (in whose hand, lies the power of appointment and dismissal of the Governor).

During such proclamation, the State Assembly is either dissolved or suspended, but the Members of the Legislative Assembly (MLA's) do not lose their membership of the assembly. There is no effect of the emergency on the High Court of the State, and hence, they function independently. The President can also proclaim ordinances in the State.

If we look in the past instances, then we observe that the three common grounds that emerged after invoking the State Emergency under Article 356 are breakdown of law and order, political instability, corruption and maladministration.

In **Rameshwar Prasad v. Union of India**¹⁵ (Bihar Assembly Dissolution Case) it was held that the presidential proclamation dissolving state assembly in Bihar under Article 356 was unconstitutional on extraneous and irrelevant ground. The court said that the state governor misled the centre in recommending dissolution of state assembly.¹⁶ In the historic case of **S.R Bommali v. Union of India**¹⁷, a full bench of the Karnataka High Court produced different opinion about the imposition of the President's rule in Karnataka, while in other states the court held that it was in violation of the constitution and would have restored the original position.¹⁸

¹³Article 226 of the Constitution of India, 1950

¹⁴Samsher v. State of Punjab, AIR 1974 SC 2192 (paras. 55, 138).

¹⁵AIR 2006 SC 980

¹⁶The Constitution of India by M. P. Jain.

¹⁷AIR 1994 SC 1918.

¹⁸The Constitution of India by M. P. Jain.

The effects of declaration of **Financial Emergency** by the President under the present Article shall be as follows:

- a. During the period, any such Proclamation is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such Canons of financial propriety as may be specified in the directions.
- b. Any such direction may also include-
 - i. A provision requiring the reduction of salaries and allowances of all or any class of persons serving with respect to the affairs of a State;
 - ii. A provision requiring all Money Bills or other Financial Bills to be reserved for the consideration of the President after they are passed by the legislature of the State.
- c. It shall be competent for the President during the period any such Proclamation is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the judges of the Supreme Court and the High Courts.¹⁹

PROCEDURE TO DECLARE AND REVOKE EMERGENCY IN INDIA

1. National Emergency – Procedure to declare emergency:

- i. Earlier, under the old provision, it was possible to continue the proclamation for two months, without seeking Parliamentary approval. The period has now been reduced to one month after the 44th amendment, 1978.
- ii. Under the old provisions, by a simple majority of each house a resolution of approval could be passed. But according to the new provisions introduced by the 44th Amendment, 1978, such resolution must have the approval of a majority of the total membership of the house and by a majority of not less than 2/3rd of the members of that house present and voting.

Why 2/3rd majority? ; Because the double majority requirement puts a procedural load upon the power of Parliament to continue the proclamation in operation.

¹⁹The object of this provision is to avoid a situation as arose in the USA when the Supreme Court held [Donouge v. US (1933) 289 US 516]; Booth v. US (1934) 291 US 339] that the Appropriation Act, 1932, by which the Judges' salary was reduced, was inapplicable to Judges of Federal Courts, whose compensation "shall not be diminished during their continuance in office". [Article III, s. 1 of the Constitution]

Procedure to revoke emergency:

Earlier, there wasn't any limit to the continuance of the proclamation, once it had received a resolution of approval by the Houses of Parliament²⁰, unless and until the President issued a proclamation of revocation. But now, after the amendment, even when Parliament makes a resolution of approval, it would not survive beyond six months from the date of each such resolution. Further, the continuance by virtue of such resolutions of approval may be snapped by a resolution of disapproval passed by a simple majority in the House of People, which may be convened for the purpose by a written notice issued by 1/10th of its total members. If such a resolution of disapproval is passed by the House of the people, it would be obligatory for the President to issue a proclamation revoking or varying the proclamation in terms of such resolution.

2. State Emergency – Procedure to declare emergency:

The President of the country, after receiving a receipt 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 the Constitution,²¹ can declare or issue a proclamation. It may also happen that the President may declare emergency even without receiving a receipt by the Governor of the State. This was done by President Venkataraman in the year 1991 in the state of Tamil Nadu.

The procedure to declare state emergency is almost the same as the national emergency. Here also, the proclamation has to be placed before both the Houses of Parliament for the purpose of approval. In case of state emergency, the approval must be given within two months; otherwise the proclamation ceases to operate. If the Parliament gives the approval for the declaration of state emergency then at a time it remains valid for a period of six months. It can further be extended for a period of six months but not beyond one year. However, in a State, the emergency can be extended beyond one year if a National Emergency is already in operation or if the election commission certifies that the election to the State Assembly cannot be held.

By that proclamation the President may assume to himself all or any of the powers vested in the Governor and may declare that the power of the legislature of the State shall be exercisable by the Parliament.

Procedure to revoke emergency:

Our Constitution talks about the procedure wherein the emergency can be revoked by taking certain measures. Any such Proclamation may be revoked by a subsequent

²⁰Lok Sabha and Rajya Sabha

²¹State of Karnataka v. Union of India, AIR 1978 SC 68 (Para. 19)

Proclamation.²² This has been given in our Constitution and that is true as emergency is declared for a particular period of time, that's not permanent.

It is important that every proclamation shall be laid down or presented before both the Houses of Parliament, except in the case where it is a proclamation revoking a previous proclamation. Further, it ceases to operate at the expiration of two months unless before the expiration of that particular period the same has been approved by resolution of both Houses of Parliament.²³

Further, it has been given that if any such proclamation (not being a Proclamation revoking a previous Proclamation) is being issued at the time when Lok Sabha (also known as the House of the People) is dissolved or the dissolution of Lok Sabha takes place during the period of two months (referred to in this clause) and at the same time, if a resolution has been passed by the Council of States approving the proclamation and if there isn't any resolution approving the proclamation is being passed by the Lok Sabha (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 Lok Sabha first sits after its reconstitution unless before the expiration of the aforementioned period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.²⁴

3. Financial Emergency – Procedure to declare and revoke emergency

The procedure to invoke or declare financial emergency is the same as the procedure to declare national emergency. In India, financial emergency has never been invoked till date.²⁵

WHETHER THE EXISTING EMERGENCY PROVISIONS ARE SUFFICIENT TO DEAL WITH THE SITUATION LIKE ARMED REBELLION, WAR OR EXTERNAL AGGRESSION?

AND

WHAT IS THE USE AND MISUSE OF EMERGENCY PROVISIONS IN INDIA?

The existing emergency provisions are sufficient to deal with the situation like armed rebellion, war or external aggressions BUT there are certain flaws and loopholes which need to get amended. For example: suspension of fundamental rights during emergency (except Article 20 and 21) and moreover suspension of Article 226 also (sometimes). Now,

²²Taken from Article 356(2) of the Indian Constitution, 1950

²³Taken from Article 356(3) of the Indian Constitution, 1950

²⁴Taken from Article 356 of the Indian Constitution, 1950

²⁵Article 360(2) of the Indian Constitution, 1950.

as we all are aware of the fact that at the time of violation of fundamental rights we all move to High Court under Article 226 (or under Article 32 to Supreme Court²⁶), now if the same will be suspended (except the writ of Habeas Corpus²⁷) then what all options will be left for common people? This took place in the famous case of A.D.M. Jabalpur v. Shivakant Shukla²⁸ where The President, under Article 359(1), issued orders in which he suspended the right of every person to move to any court for enforcement of Fundamental Rights under Article 14, 19, 20 and 21 of the Indian Constitution. As a result, hundreds of persons were arrested and detained all over the nation under the Maintenance of Internal Security Act, 1971. It was held that:

'In the view of the Presidential order dated June 27, 1975 no person has any locus standi to move writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is in compliance with the Act or was illegal or was vitiated by mala fides factual or legal or is based on extraneous considerations.'

Then secondly, the overriding effect of National Emergency over State emergency. These are certain areas which are needed to be answered as early as possible. In India, only Chhattisgarh and Telangana are the two states where state emergency has never been declared, rest all the other 27 states are being covered till date. Recently, the President's rule was declared in Uttarakhand. Now the question is, why there was a need to declare state emergency? Why constitutional machinery failed in the state?

As far as National Emergency is concerned then after the 44th Amendment, 1978, things have changed drastically. Now, the scope of declaring National Emergency has narrowed down to such a level that it is almost impossible to declare National Emergency in the country. Last time it was declared in the year 1975 and from then since today it has been 41 years and National emergency didn't invoke in the nation. In the year 1975, emergency was declared (For a period of 21 months from 1975 to 1977) due to 'internal disturbances' but no proper justification was given for the same. All of a sudden it was declared and several people suffered. Their fundamental rights were violated. Press and media were censored and no publications without the approval of the Government were to be made. Great leaders (because of their comments and earlier protests against the Government) and many others who were protesting against the declaration of emergency were put behind bars without any warrant or reason. Though the emergency was declared with a positive intent to tackle certain problems and disturbances, but it turned out to be the worst nightmare for every individual. An emergency is declared to safeguard the interest of public

²⁶Article 32 is suspended during Emergency.

²⁷ The Habeas Corpus Case, 1975-1977

²⁸ AIR 1976 SC 1207.

at large, it is declared for the safety, well-being and betterment of an individual but in 1975, things went wrong as the power, the Government was in wrong hands.

The 44th Amendment which took place in the year 1978 made some changes which are:

- The term “Internal disturbances” was replaced by “Armed Rebellion” under Article 352 of the Indian Constitution.
- For the declaration of emergency, proclamation is to be given in writing and should be communicated by the Cabinet of Ministers under the leadership of the Prime Minister.
- Involvement of both the Houses of Parliament is must during the Proclamation of the emergency and that too within one month of time.
- If there is a need to continue the emergency, then it must be re-approved by the Houses within 6 months.
- Emergency shall be revoked by passing a resolution to that effect by a simple majority of the Houses present and voting. 1/10th of the present members of a house can make such a resolution.
- After the amendment, it was declared that Article 19 of the Indian Constitution will be suspended ONLY in case of war or external aggression and NOT in case of armed rebellion.
- It was also said that Article 20 and 21 will not be included in the suspension of the right to move courts for violation of Part III²⁹ of the Indian Constitution. This has been given under Article 359 of the Indian Constitution.
- The term of Lok Sabha was reversed back to 5 years from 6 years.

The above changes were made with an aim to make an improvement upon the 42nd Amendment which took place in the year 1976 and to improve the provisions of the National Emergency too and as a result, 44th amendment turned out to be one the most important and major amendments which took place till date. Now we have a well-established procedure to declare emergency in the nation. In the opinion of the researcher, the fundamental rights should never be suspended during the emergency. These are the basic Human rights which could easily be misused by the executives.

Hence, if we talk about the use of National Emergency then we can say that except the third National Emergency, the other two were declared at the right time and for the right purpose. The period of 21 months from 1975 to 1977³⁰ can be considered as the darkest period of Indian history after independence. Misuse of power prevailed over the correct use of power and as a result many individuals suffered along with Political Leaders.

²⁹Talks about Fundamental Rights

³⁰Third National Emergency Period declared during the Government of Smt. Indira Gandhi.

Talking about State Emergency, criticism has been received by the Union Government from all quarters for the 'arbitrary' imposition of President's Rule. If we talk about Article 356 of the Indian Constitution, then it says that the sole purpose of giving wide powers to Union Government is basically to maintain law and order in the country along with the preservation of the unity and integrity of the nation. But, if we go by the facts or the real scenario then we see that this power has often been misused and the classic example in this case is the imposition of State Emergency for 39 times between 1966 and 1977. Be it Indira Gandhi's Government or the Janata Party Government, both used this power to dissolve State Governments ruled by opposition parties. Later, the Supreme Court reduced the scope for misuse of Article 356 by establishing certain strict and mandating guidelines for imposing State Emergency and as a result of which, since early 2000, the incidents of imposing President's Rule have dropped substantially. According to Sarkaria Commission, 'Article 356 must be used "very sparingly" and "in extreme cases" wherein there are no other viable alternatives to prevent complete failure of constitutional machinery in the state. In Punjab and Jammu & Kashmir, State Emergency lasted for 3 years which is the maximum till date.

Another issue with respect to National and State Emergencies is the consequence and level of applicability of the State emergency. Further, it is but obvious that, the National Emergency will prevail over the State Emergency as it has been declared by the Central Government. But the State should be given with certain benefits so that it can dodge the ill consequences of the emergency declared. There is a need for establishment of laws which govern such unfortunate but plausible situations. However, another point to be considered is the fact that, Governor of the state shall be instrumental in declaration of emergencies in both the cases. However, President's assent on the declaration will be crucial. This has happened during the Government of Smt. Indira Gandhi in the year 1975 till 1977³¹.

Therefore, the existing emergency provisions are 'now' sufficient to deal with the situations like war, external aggression and armed rebellion. Many changes, many amendments took place from time to time to reduce the effect of emergencies, to make correct use of the powers conferred to the Government etc. The Sarkaria Commission report, 44th Amendment and certain Supreme Court decisions played very important role to make these provisions enough and sufficient to deal with the above-mentioned situations.

CONCLUSION

Our Constitution talks about execution of power which may also lead to infringement of Fundamental Rights during the emergency. As we have seen that there was misuse of power during the third National Emergency i.e., National Emergency because of internal

³¹National Emergency was invoked due to internal disturbances.

disturbances³² (now known as armed rebellion), the fundamental right of many individual were infringed or violated. The researcher suggests that there should be some effective control mechanism to ensure limitation of this power within the purview of the Indian Constitution. The actions taken up by the Government officials must be checked so as to stop the political pickups and it should provide a way to the interest of general public. If we ignore or keep aside the part 'misuse of power' during emergency then we can say that Emergency provisions still have a part to play under conditions prevailing in India, and inspite of this it will still remain as a controversial issue in the nation. In other countries like Australia and Canada (both having federal constitutions), the courts should be given the power to agree to the extent the Centre can expand its power. It will act as a built-in mechanism to see or check the arbitrary use of discretionary powers available under the emergency provisions to the Parliament and the Executive. The ultimate power to decide lies with the President and at times such decisions might be under some influence such as political advantage, to gain supremacy etc. which can be a problematic situation against the interest of the people or the nation as a whole. Hence, to avoid such circumstances the authors of the paper suggest that there should be some power in the hands of the judiciary so that this can be curbed and also such decisions could be brought to criticism and question if they seem arbitrary.

³²From 1975 to 1977 during Indira Gandhi's Government