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Analysing the Position of Fundamental Rights During Emergency in India: Issues and Challenges

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A situation where governments position comes to a level where they fail to control the situations or there is an extreme threat or danger at any part of the territory or to the Nation. The Constitution of India comprises three kinds of emergencies- Constitutional, National, and financial. A period of governance that can be declared by the Indian President during some period of crisis is known as a state of emergency in India. By taking the advice of cabinet ministers, provisions of the Constitution can be overruled by the President. The fundamental rights of Indian citizens are guaranteed by the Constitution. Under Article 359 the President can suspend the fundamental rights of the citizens. Right to freedom consists of six freedoms that are suspended automatically whereas, in contradiction, “personal liberty and right to life” are rights that cannot be suspended even at times of emergency according to the original constitution. Here the researcher would like to talk about the importance of Fundamental Rights and when it gets important to impose a national emergency? What is the position of Fundamental rights during an emergency? What are the advantages and disadvantages of declaring an emergency? All such topics would be covered in the main paper. Fundamentals are justiciable. A person can go to the Apex Court (SC) for the implementation of fundamental rights. Article 32 of the Indian Constitution provides its citizens with this provision. Accordingly, the paper deals with the position of Fundamental Rights at times of emergency. The current paper tries to assess the extent and content of these requirements in the light of the process of these provisions during times of emergency and to evaluate their impact on constitutional democracy and individual ' liberty.

Keywords: *fundamental rights, emergency provisions, constitution, president.*

INTRODUCTION

The citizens of India are guaranteed some fundamental rights. These rights are guaranteed by the Indian Constitution. Different parts of the constitution deal with specific things. Part III of it deals with fundamental rights.¹ These rights are called “Fundamental” as these are the basic human rights that are required for the development of society as a whole. Indian Constitution has borrowed this part from the USA. Right to life, right to exploitation, etc. are a few rights guaranteed.²

These above-mentioned rights are not absolute, they do impose “reasonable restrictions” on the Indian citizens. The Central Government has the right to suspend these rights during an Emergency. Article 352 -360 under Part XVIII of the Constitution deals with provisions of emergency³. Following are the types of emergencies with the associated article:

1. Article 352- “National Emergency”
2. Article 256- “State emergency”
3. Article 360- “Financial emergency”

An emergency can be imposed by the President at times of armed rebellion, external aggressions, or war. Here, in such a situation the rights (FR’s) of the citizens can be suspended, except for two rights. All the kinds of emergencies and fundamental rights shall be discussed deeply in the main paper. FR drafts the basic structure of the Indian Constitution. Clause 2 of article 19 says that the state can impose ‘reasonable restrictions’ where offences like defamation, contempt of court, integrity, and sovereignty, etc.⁴ take place. Every citizen has the right to move to Supreme Court under art.32 and High Court under art. 226.⁵ Fundamental rights are suspended under emergency but article 20 and article 21⁶ cannot be suspended in

¹ D D Basu, *Introduction to The Indian Constitution* (LexisNexis 2009)

² R K Singh, *Constitutional Issue and Indian Polity* (Arihant Publishers 2005)

³ G Austin, *Cornerstone of Nation: The Constitution of India* (1966)

⁴ Constitution of India, art 19, cl 2

⁵ Constitution of India, arts 32 & 226

⁶ Constitution of India, arts 20 & 21

any circumstance. Everything shall be discussed deeply further in the paper and many case laws related to the topic. All the fundamental rights will be explained in a very brief manner.

RESEARCH OBJECTIVE

Following are the objectives of researching the above-mentioned topic:

- 1) To understand the history of 'Emergency Provisions'
- 2) To understand the number of times an emergency has been imposed.
- 3) To understand how Fundamental Rights are affected at times of emergency.
- 4) To understand the emergency provisions under the Indian Constitution.
- 5) To briefly understand the types of emergencies.
- 6) To understand the procedure of declaring an emergency and the procedure of revoking an emergency.

RESEARCH QUESTIONS

Following are the questions which would be answered by the researcher in the main paper:

- 1) What is the history of emergency provisions?
- 2) What are the effects of the declaration of emergency on the fundamental rights of citizens?
- 3) What are the emergency provisions available under the Indian Constitution?
- 4) What changes were brought with the 44th amendment act, 1978
- 5) What is a suspension of rights of enforcement of Fundamental Rights?

RESEARCH METHODOLOGY

The method of research which have been adopted to carry a research on the topic- 'Analyzing the Position of Fundamental Rights during an emergency in India: issues and challenges' is Doctrinal research. It is the type of research that is adopted to have research on legal propositions. The doctrinal method enquires what Law is on a particular issue. It is the type of research that is adopted to have research on legal propositions. Primary, secondary and tertiary sources were collected as the primary source and as secondary sources, many

published and unpublished data has been collected. Under the tertiary data, informative data from independent sources have been collected. An analytical method is adopted in order to analyze the position of fundamental rights. This was done with help of legislation, international treaties, articles, journals, etc. Other sources including, websites, periodicals, research papers were used.

LITERATURE REVIEW

The Indian Constitution was the primary source of the search.

- 1) The book which helped the researcher throughout the research is “In the name of Democracy” by Bipan Chandra. This book talks about the JP Movement and Emergency⁷.
- 2) Aayush Verma’s “State emergencies and the Fundamental Rights”. This article briefly describes the three types of emergencies and related case laws. This article also throws light on judicial Interpretation of emergency provisions. Sarkaria Committee is also discussed.⁸
- 3) Harshit Khare’s “Fundamental rights during an emergency”. This article talks about the procedure of proclaiming an emergency as well as the procedure of revoking an emergency and the reason behind every emergency in different divisions.⁹
- 4) Pallavi Verma’s “Emergency provisions: effect and impact”. It takes into account judicial and legislative reviews on emergencies.¹⁰
- 5) Mohit Sharma's “National emergency and fundamental rights” talks about the 3 emergencies its reasons, impacts, and threats. All FR’s are discussed and their positions during an emergency.¹¹

⁷ Bipan Chandra, *In the Name of Democracy: JP Movement and The Emergency* (Penguin 2017)

⁸ Yash Sharma, 'State Emergencies and The Fundamental Rights' (*iPleaders*, 2021)

<<https://blog.ipleaders.in/state-emergencies-fundamental-rights/>> accessed 01 July 2021

⁹ Harshit Khare, 'Position of Fundamental Rights During Emergency' (*Legalservicesindia.com*, 2018)

<<http://www.legalservicesindia.com/article/589/Position-of-Fundamental-Rights-during-Emergency.html>> accessed 01 July 2021

¹⁰ Pallavi Verma, 'Emergency Provisions: Effects and Impact' (*Legalservicesindia.com*)

<<http://www.legalservicesindia.com/article/1769/Emergency-Provisions:-Effects-and-Impact.html>> accessed 01 July 2021

¹¹ Mohit Sharma, 'Research Paper on National Emergency And Fundamental Rights' (*Idoc.pub*)

<<https://idoc.pub/documents/research-paper-on-national-emergency-and-fundamental-rights-j3nom6orrgld>> accessed 01 July 2021

- 6) Adv Abhijeet “Impact of National emergency on FR’s deals with the reasons and threats associated with a national emergency.”¹²
- 7) Srajan Kapil's “critical analysis of proclaimed emergency in India,” tells how emergency affects the economy and the life of individuals.¹³
- 8) Yash Sharma's “Emergency rights and state emergencies” talks about judicial remedies, Sarkaria committee, all the types of emergencies, amendments, etc.¹⁴
- 9) Subodh Asthana “Emergency in India: art. 352 to 360” talks about the process of implementation and revoking of emergency. ¹⁵
- 10) Krishnendra Joshi's “FR’s under Indian Constitution” describes all the fundamental rights in a very brief way. All the provisions of emergency are also discussed by the author. ¹⁶

COMPREHENSION OF EMERGENCY

In a state of affairs where the president of India observes any serious situation or where the security of India or any part is in jeopardy or is likely to be threatened, then he can impose an Emergency. It can be declared by him alone.

In the first instance, infliction of emergency caused by external aggression, war, or internal disturbances has been provided by the Indian Constitution which is also called “armed rebellion”¹⁷. To declare an emergency, the president is required to take recommendations of his cabinet members in writing. After endorsements of cabinet members, it has to be passed by both the houses of parliament with the absolute majority of all the members of the house and

¹² Adv Abhijeet Patil, 'Impact of National Emergency on Fundamental Rights in India' (*Academia.edu*, 2020) <https://www.academia.edu/28710012/IMPACT_OF_NATIONAL_EMERGENCY_ON_FUNDAMENTAL_RIGHTS_IN_INDIA_docx> accessed 02 July 2021

¹³ Srajan Kapil, 'Critical Analysis of Proclaimed Emergencies in India' (*legalserviceindia.com*) <<https://www.legalserviceindia.com/legal/article-4033-critical-analysis-of-proclaimed-emergencies-in-india.html>> accessed 02 July 2021

¹⁴ Sharma (n 8)

¹⁵ Kavita Chandra, 'Emergency in India: Explanation of Article 352-360 Under the Constitution' (*iPleaders*, 2018) <<https://blog.iplayers.in/emergency-india/>> accessed 02 July 2021

¹⁶ Krishnendra Joshi, 'Fundamental Rights Under The Indian Constitution' (*iPleaders*, 2019) <<https://blog.iplayers.in/fundamental-rights-in-the-constitution-of-india/>> accessed 02 July 2021

¹⁷ Max Jean Zins, *Strains on Indian Democracy* (ABC Pub House 1988)

2/3rd of those who are present and voting in a month.¹⁸ If the mentioned process does not take place, then the proclamation ceases to operate.¹⁹

Under Indian Constitution there are three types of emergencies defined:

- 1) Article 352 that talks about “National Emergency” which is imposed due to internal or external aggression or due to war.
- 2) Article 356 talks about constitutional apparatus in the state.
- 3) Article 360 talks about a financial emergency

1. Fundamental Rights

These are the basic rights of humans guaranteed by the Indian Constitution. These rights protect the dignity of human beings. These rights are given to all Indian citizens and in case of its breach, one can approach the court. This means that Fundamental Rights are enforceable. These rights have helped many to live their life with dignity and also helped to abolish untouchability.

FR's are divided into 6 heads:

- 1) Right to Equality- These rights are explained from Articles 14 to 16²⁰. It is also known as the keystone of the Constitution of India. Article 14 says "the state shall not deny to any person equality before the law and equal protection of the laws within the territory of India,". The next art. is article 15 looks deeper into this matter and states that there must be no discrimination only on the grounds of sex, race, caste, religion, place of birth, or any of them. It also says that no one shall be stopped from entering into any public place like temples, restaurants, public washrooms, etc. Article 16 " All citizens must have equal opportunity in matters concerning employment or appointment to any office under the

¹⁸ 'Judiciary Under Executive Assault' (1981) PUCL Bulletin

¹⁹ Mofidul Islam, 'Position of Fundamental Rights During Emergency in India' (2020) 11 International Journal of Management

²⁰ Constitution of India, art 14, 15 & 16

state." Next articles, that is Article 17 and 18²¹ are absorbed towards the abolishment of untouchability and giving of titles, respectively.

- 2) Right to Freedom- These rights are explained from Articles 19 to 22²². These are also known as the "soul of human rights in India". This article says that all the citizens have the right to speech and expression and to assemble peacefully without arms. It gives the right to form a union and gives the right to peacefully move anywhere within the territory of India, to reside in the area of own choice, and to carry out business, trade, occupation, and profession of choice. Prison Rights are stated under article 20 and say 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. It also states that one cannot be held liable for the amount of punishment greater than that is given under the Law. "no person shall be deprived of his life or personal liberty except according to the procedure established by law." This is given under Article 20.
- 3) Right against Exploitation- These rights are enumerated from articles 23 to 24²³. These rights prohibit exploitation example Human trafficking etc. Article 23 prohibits forced labor, human trafficking, beggary, and other exploitative wrongs. Prohibiting the working of children below 14 years is done by article 24. It prohibits children below 14 to engage themselves or get them engaged in dangerous activities like working at construction sites, mines or factories.
- 4) Right to Freedom of Religion- These rights are enumerated from articles 25 to 28. These rights talk about the religious minority in our country. These rights talk about free pursuance profession, practice and follow the religion of choice, right to manage the religious matters, exclusion from paying any religious taxes, and the freedom to visit the temple or religious institution of their own choice.²⁴
- 5) Cultural and educational rights- These rights are given under articles 29 to 30. These rights are given to the minority sections of our society. Article 29 gives the right to everyone, no matter where they, whether live inside the territory of India or any part of it having

²¹ Constitution of India, art 17 & 18

²² Constitution of India, art 19, 20, 21 & 22

²³ Constitution of India, art 23 & 24

²⁴ K Rai, *Indian Polity* (2007)

different language, culture or script shall have the right to conserve the same. Article 30 states "all minorities, whether based on language or religion, shall have the right to administer and establish educational institutions of their choice".²⁵

- 6) Right to constitutional remedy- This is given under article 32 and states that each and every person has the right to move to the supreme court in case of any violation of rights mentioned under part III of the constitution i.e. Fundamental rights. The only condition is that the process of reaching SC must be duly followed. The second clause of this article empowers the SC to issue directions or writs in the manner of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. These rights cannot be suspended except when an emergency is proclaimed.²⁶

2. Laws that are inconsistent with Fundamental Rights

Article 13 of the Indian Constitution defines all the laws which are inconsistent with FR shall be void. A law can be held unconstitutional by High Court and the Supreme Court on the grounds that fundamental rights are being violated by these laws.

This article also says that the amendment of the constitution cannot be defied in court but in *Kesavananda Bharti v. the State of Kerala*²⁷, the court stated that the constitutional amendment can be challenged if it violates the 'basic structure' of the Indian Constitution that is the Fundamental rights. Such amendment is void.²⁸

HISTORY OF NATIONAL EMERGENCY

During the framing of the Indian Constitution, the conditions which were prevailing at that time played a significant role and because of it, the emergency provisions were embedded. Prior to the Independence and even after it, there were many incidents faced. Consequently, those incidents compelled the constitution framers to think of such provisions.²⁹

²⁵ Sharma (n 8)

²⁶ *Ibid*

²⁷ *Kesavananda Bharti v State of Kerala* AIR 1973 SC1461

²⁸ Joshi (n 16)

²⁹ R P Dutt, *India Today and Tomorrow* (1955)

Disorderly and obstreperous forces of regionalism, languish, casteism and communalism³⁰ developed jarring and disrupted the harmony and peace of the country. That was the time of communal riots between the Hindu caste people and people of Muslim caste which created disharmony and difficulty in maintaining and establishing democracy in our country. During the framing of the constitution, the lapse of the crown came up with the problem of Kashmir, and also danger was impending from Pakistan. Some Native states like Hyderabad and Junagarh had recalcitrant arrogance to joining the union of India. This was a great hurdle for the government as separatist conduct could not be permitted because these states were essential as geographical mandatories. All such situations and circumstances motivated the requirement of Article 352.³¹

The communists were revolting and this broke down the democracy and harmony in the country. There were communist activities among the peasants and workers in the state of Telangana. All such incidents led to the framing of emergency provisions in our Fundamental book. The framers of the Constitution were worried about the smooth and successful functioning of State government and there included Article 356³².

Partition and sudden fall in the foreign exchange reserves impacted the economic health of the country. Therefore, including Article 360 was an initiative of Dr. Ambedkar in order to avoid all such legal difficulties.

1. Past pronouncements of National Emergency

Till now, a national emergency has been imposed thrice:

First National Emergency- It was declared on 26th October 1962 and lasted till 10th January 1968. It was declared because our borders in the Northeast were attacked by China.

³⁰ 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 05 July 2021

³¹ *Ibid*

³² *Ibid*

Second National Emergency- It was imposed during the 2nd war between India and Pakistan. It was imposed in 1971 on 3rd December and lifted in 1977, 21st March.

Third National Emergency- It is named an “internal emergency” and was declared because of internal disturbances. It was imposed in June 1975.³³

2. Proclamation of Emergency

The Indian Constitution states that whenever there is an emergency caused due to war, arm rebellion, or external aggression on the country then to resolve the situation there comes the need of declaring an emergency, and the whole power comes under 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 threat.³⁴

The recommendations of the 44th Amendment of the Constitution of India states that an emergency can be declared only when it’s endorsed by the cabinet in writing and has to be sanctioned by both the houses of parliament by an absolute majority of the total members and 2/3rd majority of members voting and existing within a month, or else the proclamation terminates to operate. Emergency once approved, remains in existence for 6 months from proclamation date. A separate prior resolution has to be passed by the parliament in order to extend it surpassing 6 months. It can be also revoked by the Indian President by passing another proclamation only if the situation improves.

3. Emergency surpassing Constitutional limitations

In the State of Punjab, for 3510 days exactly emergency was imposed, and for complete 10 years in Calcutta. Proclamation being, military happenings in the 1980s in Punjab. From 1872 to 1992 that is for continues 5 years Punjab was further down presidential order. The

³³ Toshiba Singour, 'Article 352: Position of Fundamental Rights During National Emergency – A Doctrinal Research' (2018) 2 Pen Acclaims <<http://www.penacclaims.com/wp-content/uploads/2018/08/Toshiba-Singour.pdf>> accessed 06 July 2021

³⁴ 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 06 July 2021

proclamation took place because of the Sikh massacre in 1984 when Indira Gandhi was murdered.

Except for Punjab exceeding the emergency limitation, it permitted three years period former state of Jammu and Kashmir. From 1990 to 1996 which is around 6 years, 2061 days emergency was proclaimed in Jammu and Kashmir.³⁵

NATIONAL EMERGENCY

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 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 Indian constitution has provisions. At the time of emergency, the state has the complete right to take over the legislative and executive functions under their control³⁶

1. Procedure for the proclamation of Emergency

As we all know that the Indian President has the power to declare an emergency but for doing so there are certain provisions.

If it is recommended by the cabinet in writing to do so and such proclamation by an absolute majority of total members of houses is approved by both the houses of parliament also, with 2/3rd of members present for voting. If the above-mentioned is practiced only then the president can declare an emergency.³⁷

If by chance during an emergency proclamation, Lok Sabha stands dissolved or is not in session, in that case, it has to be approved by Rajya Sabha within a month and well along by

³⁵ Sharma (n 8)

³⁶ Singour (n 34)

³⁷ Sharma (n 8)

Lok Sabha within the same duration and start with its next session. After an emergency is approved by Parliament, it stands in force from the date of the proclamation to 6 months.

In *Minerva Mills Ltd. v UOI*³⁸ it was held that “for the legitimacy of the declaration of emergency under Art. 352(1), there is no bar to Judicial Review”. Courts have limited power extending up to the scrutiny of limits deliberated by the Indian constitution are followed or not and also to check whether President’s satisfaction is valid or not. If it's on some irrelevant or absurd grounds, then such satisfaction is not valid.³⁹

2. Procedure of revoking 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 simple majority. This method is recommended by the 44th amendment of the Constitution.

3. Effects of National Emergency- Art. 353

- 1) The form of Constitution i.e. Federal changes to Unitary. Here the parliament holds the power of law making even of state list subjects.
- 2) It affects both- the autonomy of the state and the rights of individuals.
- 3) The tenure of Lok Sabha can be extended for a year but after an emergency ceases to operate then this cannot be extended beyond 6 months. By following the same procedure, state assemblies can as well extend tenure.
- 4) Between union and states, the power to distribute revenue lies with the president.

STATE EMERGENCY

President’s rule is another name for a state emergency. When there is the breakdown of constitutional machinery of state, this type of emergency is declared.

³⁸ *Minerva Mills and Others v Union of India and Others* 1980 AIR 1789

³⁹ Islam (n 20)

If the Indian President on the basis of a government report of a particular state is satisfied, or due to other sources, the government cannot function in accordance with the Constitution, a state emergency can be declared by him. Within 2 months, an emergency must be permitted by parliament.⁴⁰

Such an emergency can be imposed for a period of 6 months and a maximum of 3 years but with repeated approval by parliament every 6 months. This can be done under art. 356. If an emergency requires to be extended beyond 3 years, it can be done by constitutional Amendment as happened in the case of Jammu and Kashmir and Punjab.

In such situations, the president can take control of executive functions, and the state is administered by the governor in the president's name. The legislative assembly can either remain suspended or be dissolved and the parliament is required to make laws on 66 state subjects. For approval, money bills are to be referred by Parliament.

1. Procedure for proclaiming State Emergency

It must be placed before the houses of parliament. It must be approved within 2 months or else it ceases to function. If permitted, it remains in motion for 6 months and can be extended up to a year. In 2 particular cases it can be extended beyond 1 year:

- a. National Emergency is already in function
- b. In case state assembly elections cannot take place and same is conveyed by the election commission.

2. Effects of State Emergency

1. All the powers of state government or any of them can be assumed by the president.
2. He may confer any or all the powers of the governor or any executive authority.
3. He may put the legislative assembly under suspension or may even dissolve it.

⁴⁰ 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 07 July 2021

4. President can order parliament to draft laws in place of the state legislature.

FINANCIAL EMERGENCY

In case of an economic situation wherein the credit of India or financial constancy is threatened, the president can declare a financial emergency. This provision is defined under article 360 of the Indian Constitution.⁴¹ Within 2 months of the time, an emergency must be approved by the parliament. Such an emergency has never been declared. Salaries of all judges of HC and SC and government officials can be reduced by the president. The state legislature needs to get their money bills approved by the president.

1. Effects of Financial Emergency

- a) Direction to any state can be given by Union Government on money matters.
- b) The salaries of government servants can be reduced on the president's order.
- c) Salaries of central government employees can also be reduced.
- d) After money bills are passed by the state legislature, the president can reserve it for Parliament's consideration.

Financial emergency has never been imposed therefore, there is not much information available regarding the same because no case or dispute regarding the same took place.

SEPARATION OF POWER DURING EMERGENCY

It is an important thing to discuss the doctrine of "separation of power" in normal situations and the completely different governance under exceptional situations of national emergency. In these extraordinary situations, the checks and balances become suspended therefore chances of many organs trying to surpass the power intensifies greatly. Nevertheless, it is agreed on common grounds that despite the emergency, the doctrine must function in power.

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⁴¹ Constitution of India, art 360

⁴² Islam (n 20)

This is a debatable matter which was discussed in the case of *Rameshwar Prasad v. State of Bihar*⁴³. The case had to determine that whether the imposition of art. 356 without properly considering government reports or without proper consultation of state authorities amounts to exceeding the legislative powers. Here, the central Legislature had to put themselves into the state legislature's shoes and assume complete power to themselves. In this particular case, the court held that the doctrine of Separation of power has been violated clearly.⁴⁴

FUNDAMENTAL RIGHTS DURING EMERGENCY

In a democratic country, the imposition of emergency disrupts its basic functioning principles upon which machinery of state works. The most affected area is the rights that are fundamentally given to all the citizens. In our country, fundamental rights are drastically affected during emergency imposition. Both emergency provisions and FR's are mentioned in the same document. In extraordinary situations, under article 359 the FR's are suspended. This was interpreted by the framers of the constitution that in future the national security might be threatened or in danger because of certain forces or events etc. For National security's sake, it is important to suspend fundamental rights during an emergency.⁴⁵

Protecting the national dilemma and protecting human rights was a great issue. Under article 359 all the fundamental rights are suspended but only after the 44th amendment it got clear that all the rights except for articles 20 and 21⁴⁶ will be suspended. These shall not be suspended under the purview of the presidential order.

1. Suspension of rights under Art. 359

President sustains its power to suspend the fundamental rights from art. 395 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 for enforcing such rights as suspended

⁴³ *Rameshwar Prasad v State of Bihar* AIR 1958 Pat 210

⁴⁴ Austin (n 3)

⁴⁵ Shruti Kumari, 'Fundamental Rights & Proclamation Of Emergency' [2019] Legal Desire International Journal on Law <<https://legaldesire.com/fundamental-rights-proclamation-of-emergency/>> accessed 07 July 2021

⁴⁶ Constitution of India, art 20 & 21

excluding articles 20 & 21⁴⁷. 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 359(1) has to be at the earliest presented before both the houses.

2. Suspension of FR's during Emergency: Pros and Cons

Suspending the FR's during an emergency is very helpful to the president because if he needs to take any decision required to control such a situation so he can do this without any interruption or delay and therefore the action could be taken on time.

The worst condition for citizens during an emergency is if the right against exploitation is suspended then people might be exploited by those who have authority. They can make one do anything, even against their will and the person might feel helpless. Not being able to approach the court will for sure make the condition worse. People with high authority can misuse their power and exploit the general public.

3. Effects of 44th Amendment Act

Changes under this amendment can be possibly divided into 2 heads. First, it changed the power vested in the president regarding the suspension of fundamental rights and said that two articles- art 20 and 21 cannot be suspended in any case. Second, a law enacting power with the state cannot be enacted without overtly stating that the particular law is enacted in concern with proclamations of emergency. Any law enacted without stating it shall not be enforced.

Enactment of law without declaration can be challenged in the court of law even during an emergency. In the case of ADM Jabalpur v. S Shukla bench of Sc decided that a person cannot move to the court for violation of the "Right to life". This judgment was called 'anti-people' because SC stepped back from their responsibility of safeguarding the most important FR of individuals. In order to make sure that such a right or such incident does not happen in the future, the amendment act made sure that art. 20 and 21 cannot be suspended even during the

⁴⁷ *Ibid*

proclamation of emergency. If these rights are violated then he/she has complete right to move to court.

4. Right to Judicial remedy

The right to move to the court does not get automatically suspended like article 358. It comes in force only after a presidential order that the right to move to court stands suspended. On 3rd November 1962 that is the Indo-China war, under article 256(1) presidential order was released. It was stated that under clause (1) of art 256 the president declares the right to move to court in case of violation of art. 14, 21, and 22⁴⁸ shall remain suspended in case of the proclamation of emergency.

In *Makhan Singh v. State of Punjab*⁴⁹, 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 art. 14, 20, and 21⁵⁰. The HC dismissed the petition 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 art. 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 the jurisdiction under art. 226 can do so. That includes the High Court.

5. Malafide Detention

It has been made clear by Supreme Court that detentions nature may be Mala fide or bona fide, in any case, is significant. If because of detention, a person's FR is abridged then he/she can move to court and obtain the writ of 'habeas corpus' if the nature of detention is mala fide. The rest of the rights which the president has non suspended can be enforced in the court of law. If a detained person files plea 'that Defence of India, Act, and ordinance' due to which the

⁴⁸ Constitution of India, art 14, 21 & 22

⁴⁹ *Makhan Singh v State of Punjab* AIR 1964 SC 72, 83

⁵⁰ Constitution of India, art 14, 21 & 22

detained person grieves from the disproportionate delegation of power. Presidential order cannot be barred such pleas as such plea is not mentioned in the order of fundamental rights.⁵¹

JUDICIAL INTERPRETATION OF EMERGENCY PROVISIONS

Article 356 is particularly about state emergency but one must know that it is a part of all the provisions which deal with an emergency. Dr. Ambedkar with hope kept these provisions in the constitution. He called them 'dead letters' because he hoped such provisions won't be used in the future. Using such provisions would mean the failure of state mechanisms that cannot be implicit. It could be better understood by two cases - State of Rajasthan v. UOI (AIR 1977 SC 1361) and S.R. Bommai v. UOI.⁵² 7 and 9 judges bench ruled the case respectively. For understanding, S.R. Bommai case is adequate as one way or the another, Bommai case advances from the State of Rajasthan case.⁵³

Clause 1 of art. 356⁵⁴ has been reviewed by the court that talks about the president's satisfaction upon getting the governor's report talking about the failure of the state government to function in compliance with the Constitution. Here, the court states that the President because of the report must feel satisfied that the situation is severe and requires emergent actions.

It has been made compulsory by Article 74(1)⁵⁵ for to president to follow the assistance of the council of ministers. Article 356(1) states that if constitutional provisions cannot be followed by the state government, then it means the failure of it.

1. Dissolution of Legislative Assembly

It has not been expressly mentioned in art. 356 that legislative assembly has to be dissolved. Since the Independence, the practice or the power to dissolve it lies with President. This was

⁵¹ V Maya Krishnan, 'EMERGENCY AND PERSONAL LIBERTY' (1966) 8 Journal of the Indian Law Institute <<https://www.jstor.org/stable/43949912>> accessed 08 July 2021

⁵² *SR Bommai v Union of India* AIR 1994 SC 1918

⁵³ Md Mustakimur Rahman, 'Fundamental Rights in Times Of Emergency: Aaur Rahman v Muhibur Rahman Revisited' (2018) 05 Brawijaya Law Journal

⁵⁴ Constitution of India, art 356, cl 1

⁵⁵ Constitution of India, art 74, cl 1

held through the S.R Bommai case. If both the houses of parliament under art. 356(3) agrees to the proclamation, only then it could be exercised. If disapproved, then the assembly shall be reconstituted without any impact of the emergency proclamation and if it is held invalid and agreed by both the houses, status quo ante can be restored by the court. If the validity of the proclamation is challenged in court, then interim order can be issued by the court restraining the holding of new elections unless the case disposes of. Article 356(3) works as a safety mechanism for the protection of federalism in Indian Polity.

SARKARIA COMMITTEE

The committee in chapter 6 analysis the report related to article 356. It stated that art. 356 has been used in many instances whereas it was expected to remain a dead letter. Using this article has been rapidly increased. Responsibility or power of the centre to reinstate the representative government in states is assisted by the support of the public. For the proclamation of presidential rule, the article has been used several times. The committee was formed in 1983. To improve center-state relations, the commission took 4 years.

In its first report, it has been recommended that art. 356 must be used in extraordinary cases. Article 355 states that government has to take care of the security and well-being of the state. "Failure of a constitutional provision, notwithstanding of its significance, effect and extend, cannot be treated as constituting a failure of constitutional machinery". After taking all the recommendations, suggestions, etc the committee stated that article 356 must be used only when existing sources fail to rectify the constitutional machinery.

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*⁵⁶. 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.

⁵⁶ *Maharashtra state v Prabhakar* AIR 1996 SCC (3) 463

- In *Ram Manohar Lohia v. State of Bihar*⁵⁷, the court held detention under detention of India to be invalid because the detention was against the circumstances laid down in rules. Here, the power to detain was delegated by the government to the district magistrate under the Defence of India act, 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*⁵⁸ 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 suspended then this is itself a violation of art. 14. The court overruled its past judgement of *Ghulam Sarwar v. Union of India*⁵⁹.
- Supreme Court in *A.D.M. Jabalpur v. S. Shukla*⁶⁰, 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)

⁵⁷ *Ram Manohar Lohia v State of Bihar* AIR 1966 SC 740

⁵⁸ *Mohd Yaqub v State of Jammu and Kashmir* AIR (1992) 4 SCC 167

⁵⁹ *Ghulam Sarwar v Union of India and Ors* AIR 1967 SC 1335

⁶⁰ *ADM Jabalpur v Shiv Kant Shukla* AIR 1976 SC 1207

CONCLUSION AND SUGGESTIONS

The Indian history concerning fundamental rights and steadiness with provisions of emergency is filled with ambiguity and vagueness. Fundamental rights are those rights that are basic for living a life with dignity and for their development. They are a rich part of the Indian Constitution so that each individual can enjoy them. While these rights are suspended when an emergency is declared by the president. Declaration of emergency is not a petty issue, it is one of the most serious ones because it is imposed when there is some sort of disturbances in the country or in any part of it. While during normal situations people have the right to move to court under article 32 whereas during an emergency this right is suspended. All the fundamental rights stand cancels during the proclamation of emergency. Earlier even articles 20 and 21 were suspended until the 44th amendment took place. In my opinion, suspending article 20 that right against exploitation can cause extreme troublesome situations are people who have the authority or who are in dominating position can dominate the will of another person. Therefore, as provisions of the constitution are included for the purpose of national security, such a right must not be taken away.

To an extent, the Indian judiciary closed its doors of providing people with the justice they deserve. In the paper, we discussed a situation wherein people could not approach the supreme court when their fundamental rights were violated. This situation was solved by the 44th amendment act only where all the FR's except art. 20 and 21 are suspended. Therefore it was clearly held by the supreme court that no matter whatever the situation is that is even during an emergency one has the right to move to the court if their fundamental right which is mentioned in part III of the Constitution is violated.