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Between Unity and Freedom: India's Emergency Powers

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This article examines the constitutional framework governing emergency powers in India, focusing on the delicate balance between national security and individual liberties. It traces the historical evolution of emergency provisions from colonial legislation to their incorporation in the Constitution, particularly under Articles 352, 358, and 359. The study highlights how these provisions enable a temporary shift from a federal to a unitary structure, granting extensive powers to the executive during crises. However, such concentration of power raises significant concerns regarding potential abuse, as evidenced during the 1975 Emergency. The paper critically analyses the impact of emergency proclamations on Fundamental Rights, especially the suspension of freedoms under Article 19 and the restriction on judicial remedies under Article 359. Judicial interpretations, including landmark cases such as A.D.M. Jabalpur v Shivakant Shukla, are evaluated to understand the role of the judiciary in safeguarding liberties during extraordinary times. The article also discusses the transformative effect of the Forty-Fourth Amendment in introducing safeguards against executive excesses. Ultimately, the article argues for a more robust constitutional mechanism that preserves democratic values even during emergencies, emphasising the need for limiting executive discretion and protecting core human rights.

Keywords: *unity, freedom, constitution, emergency.*

INTRODUCTION

The Indian constitutional order reverberates a flexible fluid federalism[1], which in times of crises suffers some unitary transformation but never annihilation of statehood. Thus, a notable feature of the Indian Constitution is the way in which the normal peacetime federalism can be adapted to the Emergency. The framers of the Constitution felt that, in an Emergency, the centre should have overriding powers to control and direct all aspects of administration and legislation throughout the country.[2] Proclamation of an Emergency is a very serious matter as it disturbs the normal fabric of the Constitution, and adversely affects the rights of the people. The question as to whether a grave Emergency exists or whether there is an imminent danger thereof is left to the satisfaction of the executive, for it is obviously in the best position to judge the situation. However, at the same time, there is the co-relative danger of the abuse of such extraordinary power leading to totalitarianism. The extraordinary powers conferred on the executive by the Emergency provisions of the Constitution had created misgivings in the minds of the Constitution-makers themselves.[3] They feared that the Emergency provisions might endanger democracy and undermine the dignity and worth of the individual.

Accordingly, adequate safeguards are necessary to ensure that this power is properly exercised and not abused. Such a Proclamation should, therefore, be issued only in exceptional circumstances and not merely to keep an unpopular government in office, as happened in June 1975. As a consequence thereof, the Emergency provisions have been extensively amended by the Constitution (Forty-Fourth Amendment) Act, 1976, with a view to introducing several safeguards against the abuse of power by the Executive in the name of Emergency.

EMERGENCY LAW IN INDIA: BACKGROUND AND EVOLUTION

India has had a fairly long familiarity with Emergency laws, going back to the country's colonial history and beyond. The British, who ruled India between 1813 and 1947, made liberal provisions for Emergency powers, partly to deal with the various social and political

[1] The federal principle is the method of dividing powers so that the general and regional Governments are each, within a sphere, coordinate and independent. The Constitution of the Republic of India is generally stated to be quasi-federal

[2] B M Gupta, *Constituent Assembly Debates* (vol IV, 1947) 797

[3] H V Kamath, *Constituent Assembly Debates* (vol IX, 1949) 439

tensions which were endemic in Indian society at the time, and partly to establish and consolidate their own hold over the country. One of the earliest legislative enactments on the subject was the Indian Councils Act, 1861, which allowed the governor-general, in cases of Emergency, to make and promulgate ordinances for the peace and good Government of India. This power, which was circumscribed by certain safeguards, was used sparingly for over half a century since its enactment.

Another law that was often used to deal with localized emergencies is a provision in the code of criminal procedure, which allowed magistrates to order any person to do or abstain from doing certain things, or to take certain action in respect of property in his possession or under his control where the magistrate considers that such a direction is likely to prevent obstruction, annoyance or injury to a person, or danger to human life, health or safety, or a disturbance of the peace, or a riot or affray. Orders under this law could be made without the person affected being given any prior notice in cases of Emergency, and they could remain in force for up to two months. They could be made against the general public who may be frequenting or visiting a certain place or area. This provision was normally used to ban assemblies where a breach of the peace was apprehended. This provision was allowed to continue in force after independence, and has been invoked fairly frequently by magistrates over the years.

THE GOVERNMENT OF INDIA ACTS

The year 1919 saw the enactment of the Government of India Act, which reaffirmed the power of the governor-general, in cases of Emergency, to make and promulgate ordinances for the peace and good governance of India. Any such ordinance would be valid for six months and would enjoy the same status as a law passed by the Indian Legislature. The satisfaction of the governor-general as to the existence of an Emergency was held to be absolute, as was his opinion as to whether any ordinance promulgated conduced to the peace and good governance of the country. A similar power was conferred by the Government of India Act, 1935, which superseded the 1919 Act and which was to form the basis for the country's post-independence Constitution. Under this Act, the Governor-General could issue a Proclamation whenever he thought that a grave Emergency exists whereby the security of India is threatened, whether by *war or internal disturbance*. While such a Proclamation

remained in force, he could legislate by ordinance in respect of both Central and provincial matters.

CONSTITUENT ASSEMBLY AND ITS DELIBERATIONS ON EMERGENCY LAW

The Constitution continued the colonial tradition of conferring legislative powers on the Executive by providing that both the President and State governors could issue ordinances having the force of law when Parliament or a State Legislature respectively was not in session, if they were satisfied that circumstances existed which render it necessary to take immediate action. The Emergency provisions owe their origin and their form largely to the Government of India Act 1935. In case of a national emergency, the governor-general could apportion to himself extensive powers, legislative and executive, for the duration of the Emergency and do this on his own motion. Against this background, the founding fathers of the Indian Republic deliberated long and hard over the shape and content of the Emergency powers in the new Constitution.

DEFENCE OF INDIA ACT 1962

The first occasion when a state of Emergency was declared under Article 352[4] came on 26 October 1962, when, following an incursion by the Chinese troops into India's northern frontier, the Indian cabinet led by the then Prime Minister Jawaharlal Nehru advised the President to issue a Proclamation of Emergency because a grave situation exists whereby the security of India is threatened by *external aggression*. On the same day, the President issued an ordinance, the Defence of India Ordinance, 1962, which authorised the Central Government to make rules for securing the defence of India, the public safety, the maintenance of public order, and the efficient conduct of military operations and for maintaining supplies and services essential for the life of the community. A bill was introduced in the Parliament to replace the Defence of India ordinance.

The Defence of India Bill was passed by both houses of Parliament and brought into force on 12th December 1962. The enactment of this Act was followed by a number of administrative measures of wide-ranging character which, as well as affecting the civil liberties of the people, also saw a concentration of power in the Central Government. The Defence of India

[4] Constitution of India 1950, art 352

rules conferred sweeping powers on both the Central and State Governments in areas such as preventive detention, defence preparation, control over arms and explosives, management of news and information, requisitioning and acquisition of property and control of industrial relations.

DEFENCE OF INDIA ACT 1971

The second occasion on which national Emergency was formally invoked came in December 1971 when there was a fresh outbreak of hostilities between India and Pakistan on India's western border. On 3rd December 1971, the President of India issued a Proclamation under Article 352, declaring that a grave situation exists whereby the security of India is threatened by *external aggression*. The Parliament hurriedly passed a law, the Defence of India Act 1971[5], intended to provide for special measures to ensure the public safety and interest, the defence of India, civil defence and for the trial of certain offences and for matters connected therewith. This Act conferred wide-ranging powers on the Central Government to make rules for securing the defence of India and civil defence, the public safety, the maintenance of public order for the efficient conduct of military operations or maintaining supplies and services essential to the life of the community. It prescribed enhanced penalties, including the death penalty, for the offence of waging war against India or assisting any country committing aggression against India. It allowed State Governments to constitute special tribunals to try such offences. Accordingly, it was also laid down that no legal proceedings were to lie against any person or against the Government or anything done in good faith in pursuance of the Act.

EMERGENCY AND FUNDAMENTAL RIGHTS

It is universally accepted that human beings need the protection of certain basic interests to lead a life worthy of a human being. This idea led to the recognition of fundamental liberties, areas which should be left free of legal duties. It was soon found that if such liberties should be available against the government, the government should also be denied the power to interfere with them. Accordingly, the disabilities thus imposed on state organs with corresponding immunities to the citizens are termed as Fundamental Rights. On the basic principle that government is only a means to secure the well-being of the people, any scheme

[5] Defence of India Act 1971

that would thwart the existence, let alone the well-being of the people, cannot be tolerated. To borrow Abraham Lincoln's words, while the government, of necessity, should not be too weak for its existence, it should not also be too strong for the liberties of its subjects.

An emergency has a debilitating effect on the rights of the people in a democratic country. However, the theory that supports the suspension of the Fundamental Rights during times of Emergency is that when the country is engaged in a war of survival, the people have to sacrifice their rights to some extent so that the state may live. If the state goes down, the people also go down. Article 352 of the Constitution of India authorises the President to proclaim an Emergency when he is satisfied that war, external aggression, armed rebellion, or a threat thereof, endangering the security of the whole or a part of India, has created a grave Emergency in the country. Article 352 speaks of the subjective satisfaction of the President. This Article does not insist on the actual occurrence of war, external aggression, or armed rebellion.

The Proclamation of National Emergency casts a shadow on Fundamental Rights. According to Article 358,[6] the instant effect of this Proclamation is a complete suspension of the six freedoms in Article 19[7]. This suspension leaves the Executive and the Legislature free during an emergency to ignore these freedoms. Article 359[8] empowers the President to suspend the right of access to courts for the enforcement of any or all of the Fundamental Rights, except for those provided in Articles 20 and 21.[9]

THE PRESENT POSITION

Articles 358 and 359[10] describe the effect of the Proclamation of Emergency on the Fundamental Rights. If an Emergency arises out of a declaration that the security of India or of any territory is threatened by war or external aggression, Article 358 removes the fetters created on the legislative and executive powers by Article 19 and if the legislatures make laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the Emergency or even after it. As soon as the Proclamation of Emergency is issued on the grounds of war or external

[6] Constitution of India 1950, art 358
[7] Constitution of India 1950, art 19
[8] Constitution of India 1950, art 359
[9] Constitution of India 1950, arts 20-21
[10] Constitution of India 1950, arts 358-359

aggression, Article 19 ceases to restrict the power of Parliament to make laws. This is an automatic incidence of a Proclamation of Emergency on the grounds of war or external aggression. But the effect of any law on the operation of Article 19 is not automatic or general. A law which is intended to defy Article 19 must contain a recital to the effect that such law is in relation to the Proclamation of Emergency and an executive action taken only under such a law and not otherwise is protected from the attack of provisions of Article 19. Moreover, the operation of such laws and executive actions outside the territory under the Proclamation of Emergency is not protected under Article 19 unless the activities in such territory threaten the security of India or any part of it. As soon as the Proclamation ceases to operate, the legislative enactments passed, and the executive actions taken during the course of the Emergency shall be inoperative to the extent to which they conflict with the rights under Article 19.

Article 358 does not operate to validate a legislative provision which was invalid before the Proclamation of Emergency. It was held in ***State of M.P. v Thakur Bharat Singh***[11], that all executive actions which operate to the prejudice of any person must have the authority of law, and the terms of Article 358 do not detract from that rule. Article 358 merely provides that so long as the Proclamation of Emergency subsists, law must be enacted and executive action may be taken in pursuance of lawful authority, which, if the provisions of Article 19 were operative, would have been invalid. Thus, in ***Bennett Coleman & Co. v Union of India***[12], the Supreme Court held that the Newsprint Policy of 1972-73, which was a continuation of the old policy made before the Proclamation of Emergency, was not protected during the Proclamation of Emergency from attack under Article 19. It was observed that an executive action which was unconstitutional at the time of its being taken, is not immune from being challenged in a court of law during the Proclamation of Emergency. Therefore, a Proclamation of Emergency would not authorise the taking of detrimental executive action during that period affecting Article 19 without any legislative authority or in purported exercise of power conferred by any pre-Emergency law which was invalid when enacted.

The Supreme Court has now explained the effect of Article 358 as follows in ***Attorney General for India v Amratlal Prajivandas***[13]: *"Article 358(1) enables the state to make any law or to take*

[11] *State of M.P. & Anr v Thakur Bharat Singh* AIR 1967 SC 1170
[12] *Bennett Coleman & Co. & Ors v Union of India & Ors* AIR 1973 SC 106
[13] *Attorney General for India v Amratlal Prajivandas* AIR 1994 SC at 2179

any executive action inconsistent with Article 19. This power is confined to the period of Emergency. As soon as the Emergency ceases, the law so made shall, to the extent of inconsistency with Article 19, cease to have effect, except with respect to things done or omitted to be done before the law so ceases to have effect. What it means is that the validity of the law made or the things done or omitted to be done by virtue of the said Article during the period of Emergency cannot be questioned either during or after the Emergency on the ground of inconsistency with Article 19."

Thus, if the freedom of speech has been curtailed during the Emergency to the extent not warranted by Article 19(2), the citizen whose right has been unreasonably curtailed cannot sue the state for damages or any other relief, nor can he take any other proceeding for unreasonably curtailing his right during the Emergency period. Moreover, Article 359 provides that during the operation of the Proclamation of Emergency, enforcement through courts of all or any of the Fundamental Rights except those in Articles 20 and 21[14] may be suspended by the President. Such suspension has the effect of authorising the legislative and executive action against those Fundamental Rights whose enforcement has been so suspended. But a law intended to intrude into a fundamental right must make a specific recital to that effect, and an executive action causing infraction of such a right must have its basis in such a law.

The suspension order issued under Article 359(1)[15] shall remain valid during the continuance of the Emergency or for such shorter period as may be specified in the order issued by the President. Again, an order suspending the enforcement of all or any of the Fundamental Rights may extend to the whole, or any part of the territory of India. Thus, after the Forty-fourth Amendment, the only difference left between Articles 358 and 359 is that, firstly, while the former is confined to Article 19, the latter extends to all Fundamental Rights except those in Articles 20 and 21. Secondly, the former suspends the rights while the latter suspends only the remedy. Thirdly, as held in ***Makhan Singh v State of Punjab***[16], because of the preceding difference until the Thirty-eighth Amendment, which introduced clause (1-A) in Article 359, while no actions could be initiated against the violation of Article 19 either during or after the Emergency, actions could be taken against the violation of other Fundamental Rights whose enforcement was suspended by the President under Article 359. This position,

[14] Constitution of India 1950, arts 20-21
[15] Constitution of India 1950, art 359(1)
[16] *Makhan Singh v State of Punjab* AIR 1964 SC 381

however, stands changed by the inclusion of Article 359(1-A)[17] and the effect of suspension of enforcement of Fundamental Rights under Article 359 is the same as that of Article 19 under Article 358. The result is that during the period the Presidential Order suspending enforcement of certain Fundamental Rights is in operation, the state is empowered to make any law or take any executive action inconsistent with such rights. This is so even though, in theory, these rights are not suspended; they remain alive, and only their enforcement is suspended, but Article 359(1-A) has to be given effect to.

However, the point of similarity in Articles 358 and 359(1-A) is that both provide that as soon as the Proclamation of Emergency ceases to operate, the effect of the suspension imposed vanishes except in respect of things done or omitted to be done before the law so ceased to have effect. Accordingly, it was held in ***Madan Mohan Pathak v Union of India***[18], that it would be wrong to hold that the suspension of invalidity during the Emergency is converted into validation of law and that the rights conferred under the Constitution were washed off. A law inconsistent with the Fundamental Rights made during the Emergency would not be validated, but only its invalidation is suspended.

In ***Makhan Singh*** **v** ***State of Punjab***[19], the Supreme Court considered the effect of the Proclamation of Emergency in 1962 and the Presidential Order issued thereof by the President under Article 359. It held that the sweep of Article 359(1) and the Presidential Order issued under it is wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is, in substance, seeking to enforce any of the specified Fundamental Rights and that includes the Fundamental Rights under Articles 14, 19, 21 and 22. Even in pronouncing thus, the Court took the precaution of pointing out that, as a result of the issue of Proclamation of Emergency and the Presidential Order, a citizen would not be deprived of his right to move the appropriate court for a writ of *habeas corpus* on the ground that his detention has been ordered *mala fide*. Similarly, if a detenu contended that the operative provisions of the Defence of India Ordinance under which he was detained suffer from the vice of excessive delegation, the plea thus raised by the detenu could not, at the threshold, be said to be barred by the Presidential Order because,

[17] Constitution of India 1950, art 359(1-A)
[18] *Madan Mohan Pathak v Union of India & Ors* AIR 1978 SC 803
[19] *Makhan Singh v State of Punjab* AIR 1964 SC 381

in terms it was not a plea which was relatable to the Fundamental Rights specified in the said order. There were two other grounds which a detenu was entitled to take, notwithstanding the Presidential Order. These were as laid down by the Court, firstly, that the order of detention is passed by a delegate outside the authority conferred by the Government on him, or secondly, that the power was exercised inconsistently with the conditions prescribed in that behalf.

In ***Ram Manohar Lohia v State of Bihar***[20], the Court while declaring the order of detention under the Defence of India Rules as illegal on the ground that the actual order of detention in the case was not in terms of the rules, stated thus: *"When the liberty of a citizen is put within the reach of authority and the scrutiny from courts is barred, the action must comply not only with the substantive requirements of the law but also with those forms which alone can indicate that the substance has been complied with."*

Thus, the consequences of the Presidential Order are that any proceeding which may be pending on the date of the order remains suspended during the time the order is in operation and may be revived when the said order ceases to be operative. Also, fresh proceedings cannot be taken by a citizen after the order has been issued, because the order takes away the right to move any court during the operation of the order. The said right cannot be exercised by instituting a fresh proceeding contrary to the order. If a fresh proceeding falling within the purview of Article 359(1) and the Presidential Order issued thereunder is instituted after the order has been issued, it will have to be dismissed as being incompetent. In other words, the suspension of Article 19 is complete during the period in question, and legislative and executive action which contravenes Article 19 cannot be questioned even after the Emergency is over. The result of this clause is that no Act of Indemnity is necessary to immunise against liability for acts done during an emergency, provided these acts were done under a law containing a recital saying that the law is in relation to the Proclamation of Emergency.

The real import of the words used in Article 359 came up for consideration in ***Mohd. Yaqub* v *State of J&K***[21], which was concerned with several *habeas corpus* writ petitions to test the validity of arrests made under Rule 30(1) of the Defence of India Rules, 1962, and the President's Order issued under Article 359(1) suspending the enforcement of Fundamental

[20] *Dr. Ram Manohar Lohia v State of Bihar & Ors* AIR 1966 SC 740
[21] *Mohd. Yaqub, Etc v The State of J&K* AIR 1968 SC 765

Rights under Articles 14, 21 and 22 during the period of Emergency. Among other grounds, it was contended firstly, that the President being an authority under Article 12, the order passed by him under Article 359 was a law within the meaning of Article 13(2) and was, therefore, liable to be examined on the hard test of Fundamental Rights, and secondly, that the enforcement of only such Fundamental Rights could be suspended which had nexus with the reasons which led to the Proclamation of Emergency. The Supreme Court rejected both arguments. Firstly, because Article 13(2) and Article 359 are parts of the same Constitution and stand on an equal footing, the two provisions must be read harmoniously so that the intention behind Article 359 is carried out and not destroyed altogether.

Thus, though an order under Article 359 may be assumed to be law in the widest sense, it cannot be law within the meaning of Article 13(2) for, if that were so, Article 359 would be nugatory. If the order is a law within the meaning of Article 13(2), the result would be that though the order says that the enforcement of a particular fundamental right is suspended during the period of Emergency, the order can still be examined with the aid of Article 13(2) on the test of the same fundamental right the enforcement of which it suspends and a declaration made thereunder has no meaning whatsoever. Secondly, it is implicit that the enforcement of a particular fundamental right suspended by the President is for the sake of the security of India, for which the Emergency has been declared under Article 352, and no further proof of it is necessary.

Indeed, the right to move the Supreme Court for the enforcement of the Fundamental Rights guaranteed under the Constitution is itself a guaranteed right by virtue of Article 32(1). But clause (4) of Article 32 itself provides that the right so guaranteed could be suspended in accordance with the provisions of the Constitution, encompassing the possibility of an emergency situation. Moreover, the Supreme Court has, in ***Makhan Singh* v *State of Punjab,***[22] held that a petitioner can challenge the validity of a law or a rule or order made under it on a ground other than those covered by Article 358, or by the Presidential Order issued under Article 359(1).

[22] *Makhan Singh v State of Punjab* AIR 1964 SC 381

POSITION BEFORE 1978

According to Article 358, as it existed prior to the year 1978, as soon as a Proclamation of Emergency was made under Article 352, Article 19 was suspended. Thus, there was an automatic suspension of Article 19. Suspension of Article 19 during the pendency of the Proclamation of Emergency under Article 352 removed the fetters on the legislative and executive powers imposed by Article 19. If the Legislature made a law or the executive committed acts which were inconsistent with the Fundamental Rights guaranteed by Article 19, their validity was not open to challenge either during the continuance of the Emergency, or even thereafter.

As soon as the Proclamation ceased to operate, the legislative enactments passed, and the executive actions taken, during the course of the said Emergency, became inoperative to the extent to which they conflicted with the rights guaranteed under Article 19, because as soon as the Emergency was lifted, Article 19, which was suspended during the Emergency was automatically revived and began to operate. Article 358 made it clear that those things done or omitted to be done during the Emergency could not be challenged even after the Emergency was over. In other words, the suspension of Article 19 was complete during the period in question, and legislative and executive contraventions of Article 19 could not be questioned even after the Emergency was over.

Article 359, as it existed prior to 1978, referred to the suspension of the operation of all Fundamental Rights other than Article 19 during an Emergency proclaimed under Article 352. Under Article 359, Fundamental Rights as such were not suspended; what was suspended was their enforcement. Under Article 359, as it stood prior to 1978, the enforcement of all Fundamental Rights (other than Article 19, which is the subject matter of Article 358) could be suspended during an Emergency by an executive order. This meant that the President could, by an order, declare that the right to move any court for the enforcement of any Fundamental Right, and all proceedings pending in any court for the enforcement of the rights mentioned therein shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

On June 25, 1975, an emergency was declared in India on the grounds of internal disturbance threatening the security of India. Under Article 359, a Presidential Order was issued on June

27, 1975, suspending the enforcement of Article 14. Several crucial questions pertaining to Article 359 arose during this Emergency period. One of the questions that arose was whether Article 16 was also suspended, although it was not mentioned in the order. On the one hand, it was argued that as Article 16 was only an incident of the concept of equality contained in Article 14, and, therefore, when Article 14 was mentioned in the Presidential Order, it also affected Article 16 without being specifically mentioned therein. On the other hand, it was argued that Article 16 remained operative even though the enforcement of Article 14 was suspended as under Article 359, as the enforcement of only such Fundamental Rights was suspended as were specifically and expressly mentioned in the Presidential Order, and, therefore, suspension of enforcement of Article 14 would not include Article 16 as well.

In ***Makhan Singh* v *State of Punjab***, while distinguishing between Arts, 358 and 359, the Court pointed out that, unlike Article 358, under which the right itself was suspended, the Presidential Order under Article 359 "cannot widen the authority of the legislatures or the executive; it merely suspends the right to move any court to obtain relief on the ground that the Fundamental Rights have been contravened if the said rights are specified in the Order". The inevitable consequence of this, according to the Court, was that as soon as the Order ceases to be operative, the infringement of the rights made either by the legislative enactment or by executive action can perhaps be challenged by a citizen in a court of law and the same may have to be tried on merits on the basis that the rights alleged to have been infringed were in operation even during the pendency of the Presidential Order.

Thus, in effect, what the Supreme Court stated was that when the Emergency came to an end, those persons who had been denied enforcement of their Fundamental Rights because of Article 359 and the Presidential Order thereunder, could sue the government for damages on the ground that not their rights, but only their enforcement, had been suspended during the Emergency.

THE HABEAS CORPUS CASE

The issue relating to the suspension of the writ of *habeas corpus*[23] during the period of the Emergency declared under Article 352 came up before the Supreme Court in ***A.D.M., Jabalpur v Shivakant Shukla***. In 1975, the President, on the advice of the Prime Minister,

[23] *A.D.M., Jabalpur v Shivakant Shukla Etc Etc* AIR 1976 SC 1207

declared an Emergency under Article 352 on the grounds that the security of India was threatened by internal disturbance and also issued an order under Article 359 suspending the right of access to the courts for the enforcement of rights enshrined in Articles 21, 22 and 14. After that, the Parliament amended the Maintenance of Internal Security Act 1971 (hereinafter MISA)[24] and conferred extraordinary powers on the government to detain a person without trial. The provisions of the amended MISA covering Emergency detention were extremely drastic. India had never before witnessed such a rigorous version of preventive detention. A stone-wall was sought to be created around the grounds of detention. Only the Administration was to have knowledge of the grounds, and no one else, not even the detainee. The provisions were so drafted as to exclude judicial review of any case of Emergency detention. The only safeguard was the self-discipline of the government or the officers having the power to detain people, the review by the government of the exercise of the power by its officers, and four-monthly reviews by the government of each case of detention, and, ultimately, control by the Central Government. A question arose whether the writ of *habeas corpus* under Article 226 could be issued to release a detenu on the ground that his detention was inconsistent with the provisions of the MISA or was *mala fide*. Accordingly, several writ petitions were moved in various High Courts under Article 226 challenging preventive detention orders as being not in compliance with the law. In some of these cases, the High Courts did hold that an order of preventive detention was reviewable on some limited grounds.

In the *habeas corpus case*, the Supreme Court, with the dissent of Khanna, J., legitimized the suspension of the writ of *habeas corpus* during the period of Emergency based on higher claims of national security, and held that in view of the Presidential Order 1975, no person had any *locus standi* to move any petition before a High Court under Article 226 for a writ of *habeas corpus,* or any other writ, to challenge the legality of a detention order on any ground whatsoever, e.g., it was not under, or, in compliance with the Act, or was illegal, or was vitiated by *mala fides,* factual or legal, or was based on extraneous considerations. The majority of advanced arguments mainly support the following arguments for this view:

- Article 21 was the 'sole repository' of the rights to life and personal liberty against the State. Any claim to a writ of *habeas corpus* to challenge detention on any ground

[24] Maintenance of Internal Security Act 1971

amounted to enforcement of the right of personal liberty under Article 21, the enforcement of which had been suspended by the Presidential Order under Article 359.

- Article 21 contained the words 'procedure established by law'. So, when a person complained that his detention was not in accordance with MISA, he was, in substance, complaining of a violation of Article 21, which he could not do in view of the Presidential Order.
- The Presidential Order 1975 was unconditional and much broader in scope than the Presidential Order issued in 1962, which was conditional and was confined only to the Defence of India Act or the Rules made thereunder. Therefore, the cases under the earlier emergency of preventive detention were not relevant under the Presidential Order 1975.

The majority, however, emphasized that the suspension of Article 21 did not affect the general rule that the executive could not detain a person otherwise than under a law, but it also maintained that the Presidential Order barred the right to complain of any deviation, howsoever substantial it might be, from that rule and the detainee had no remedy in case his detention contravened the law under which it was issued. In substance, it meant that even if an order was not in conformity with MISA, it could not be challenged. This meant that a person could be put in prison with impunity without his getting any relief whatsoever.

Lastly, the drastic provision contained in S. 16A(9) of MISA, throwing a wall of confidentiality around the grounds of detention, which was challenged on the ground of encroachment upon the jurisdiction of the High Courts under Article 226, was upheld by the majority on the ground that it was a rule of evidence. In the instant case, the Presidential Order deprived the respondents of their very *locus standi* to file a writ petition and, therefore, S. 16A(9) could not be said to shut out an inquiry which was otherwise within the jurisdiction of the High Court to make. Thus, the *habeas corpus case* made the Emergency of 1975 most draconian of all the emergencies imposed so far under Article 352, so far as the people of India were concerned.

In contrast to the majority opinion given in the *habeas corpus case*, it is worthwhile to discuss the dissenting opinion of Khanna, J., who stated that, it is at the basis of the Indian jurisprudence that if the executive derives powers under a statute, then it is subject to the doctrine of *ultra vires* – "Law of preventive detention, of detention without trial is an

anathema to all those who love personal liberty. Such a law makes deep inroads into basic human freedoms which we all cherish and which occupy a prime position among the higher values of life… The vesting of power of detention without trial in the Executive, they assert, has the effect of making the same authority both the prosecutor as well as the judge and is bound to result in arbitrariness". This principle, it is submitted, has been applied to all kinds of situations to protect various kinds of rights, whether fundamental or otherwise. It is the foundational norm of the constitutional system in India and is not derivable from any Fundamental Right. Therefore, even if the right to personal liberty cannot be claimed outside Article 21, the norm that the executive must act within the confines of the law should remain operative, as it is not dependent on Article 21. It is inconceivable that this norm should operate in all areas during an Emergency except in the matter of personal liberty. To challenge an order of detention based on *ultra vires* is not an enforcement of the right to personal liberty but of the basic general norm that the executive must act within the bounds of law.

Comparing the Presidential Order of 1975 with those of 1962 and 1971, Khanna, J., said, "The protection afforded by those Presidential Orders was not absolute: it was conditional and confined to ruling out the challenge to detention orders and other actions taken under the provisions mentioned in those Presidential Orders on the score of contravention of the articles specified in these orders. If the detention of a detenu was not in accordance with the provisions mentioned in the Presidential Orders, the Presidential Orders did not have the effect of affording protection to the detention order and it was permissible to challenge the validity of the detention on the ground that it had not been made under the specified provisions but in contravention of those provisions". Moving on to support his proposition that Article 21 was not the sole repository of the right to life and personal liberty, he declared: "*Question then arises as to whether the rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of Emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is the sole repository of the right to life and personal liberty…Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain Fundamental Rights, including the once relating to personal*

freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the U. S. Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life and liberty without due process of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty…. The sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilised existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty; it existed and was in force before the coming into force of the Constitution. The idea about the sanctity of life and liberty, as well as the principle that no one shall be deprived of his life and liberty without the authority of law re essentially two facets of the same concept."

It needs to be noted that Khanna, J., in his dissenting opinion in this case, stressed that the Presidential Order could not immunize an order from an attack on the ground of *mala fides,* etc., because: "*.... a Presidential Order under Article 359(1) cannot have the effect of suspending the right to enforce rights flowing from statutes, nor can it bar access to the Courts of persons seeking redress on the score of contravention of statutory provisions. Statutory provisions are enacted to be complied with, and it is not permissible to contravene them. Statutory provisions cannot be treated as mere pious exhortations or words of advice which may be abjured or disobeyed with impunity....*"

He thus opined that a Presidential Order under Article 359 could suspend enforcement of Fundamental Rights but not of statutory rights, and a redress sought from a court on the ground of breach of statutory provisions should remain outside the purview of Article 359. Further, he said: "*Even in the absence of Article 21 in the Constitution, the State has no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The principle that no one shall be deprived of his life or liberty are priceless possession which cannot be made the plaything of individual whim and caprice, and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the*

land. Article 21 incorporates an essential aspect of that principle and makes it part of the Fundamental Rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law. No case has been cited before us to show that before the coming into force of the Constitution or in countries under the rule of law where there is no provision corresponding to Article 21, a claim was ever sustained by the courts that the State can deprive a person of his life or liberty without the authority of law."

Thus, the position now, after the Forty-Fourth Amendment Act (which has been, it is submitted, much influenced by the logical opinion of Khanna, J. in his dissent in the *habeas corpus case*), is that while enforcement of Article 21 is not to be suspended at all during an Emergency, Article 22 can be suspended by virtue of the majority decision laid down in the *habeas corpus case*. Consequently, the safeguards contained in Article 22 can be nullified as regards preventive detention.

USE OF EMERGENCY POWERS: THE POTENTIAL FOR THEIR ABUSE

The Emergency provision results in gross and widespread abuse of Fundamental Rights, subversion of lawful processes and administrative procedure and other serious malpractices. Among the more egregious examples of the abuse of Emergency powers are the following:

Arrests and Detentions –

There are serious legal flaws in the orders of detention passed by the district magistrates and police commissioners in every State and Union territory. These include:

- Failure to supply the grounds of detention to detainees;
- Failure to send reports of detention to the State Governments within the prescribed period of 15 days; and
- Failure on the part of the Government to properly scrutinise the papers before approving detentions.

It is also observed, as happened in 1975, that most detainees are members or sympathisers of the political opposition. A large number of opposition politicians are detained on the grounds of their alleged participation in secret meetings in which the imposition of the

Emergency and the policies of the Government in general are criticised. Also, detentions are often based on mere suspicion.

Unlawful use of Force, Ill-Treatment and Torture: The above injustice is often compounded by harsh and insensitive treatment of those detained. The Emergency causes ill-treatment and torture of a large number of persons at the hands of the police and other law enforcement personnel all over the country. In some cases, those tortured succumb to their injuries and their bodies are quietly disposed of by the agencies involved without any intimation to their relatives.

Censorship: Censorship and other restrictions on other freedom of expression are a prime casualty of the Emergency. Not only is sweeping censorship imposed on the press, radio, broadcasting, etc., but elaborate steps are taken to stifle all expressions of dissent against the Government.

Restriction on the Freedom of Assembly and Association: The freedoms enshrined in Article 19 also come in for sustained attack during the Emergency. The Government, both at the Centre and the States, also impose selective bans on public meetings, rallies and demonstrations. A particular casualty of the Emergency is the curtailment of freedom of Trade Unions to exercise their legal rights to association and collective bargaining.

Intimidation of the Judiciary: The power of the Judiciary to review legislation and Executive action is severely curtailed by the Constitutional Amendments during the period of National Emergency, thereby putting absolutely no check on the acts of the Government organs.

Interference in Service Matters: There is widespread interference by the Prime Minister's office in the appointment, posting, transfer or continuance in service of public sector employees throughout the country with a view to either punishing those who had refused to follow illegal or irregular orders issued to them or rewarding those who had shown an eagerness to please their political masters. The verdict of the Shah Commission on these abuses was damning. Arbitrariness and reckless disregard of the rights of others and the consequent misery, which characterised a number of actions of different public servants over a period, terrorised the citizens, resulting in a complete loss of faith in the fairness and objectivity of the administration generally. Thus, we see that there is a great propensity in

the abuse of powers by the Central Executive, which acts as the final arbiter and dictator during the continuance of the National Emergency.

CONCLUSION AND SUGGESTIONS

Fundamental Rights are those unassailable, immutable (subject to "reasonable restrictions") and inalienable rights of citizens which must be guarded against all possibilities of arbitrariness and injustice on the part of a ruling government. Our Fundamental Rights form a crucial component of the basic human rights that are guaranteed to humans simply by virtue of their being human beings. State action may be a threat to these Fundamental Rights, and therefore these rights are always guaranteed against the State. Fundamental Rights protect the ordinary rights and liberties of the people by imposing limits on State action. If the limit is exceeded and the rights of the people are attacked, it gives rise to a legal injury. Nonetheless, State action is bound to cross these limits in the light of the Constitutional provisions embodying the concept of an emergency.

As already discussed, Articles 358 and 359 of the Constitution provide for suspension of Article 19, and suspension of the right to move the courts for the enforcement of other rights (except for rights enshrined in Articles 20 and 21) respectively. Going back to the drafting days of the Constitution, it is useful to note here that K.M. Munshi's proposal for suspension of Fundamental Rights during an emergency was rejected by the Fundamental Rights Sub-Committee because it would make those rights illusory. This decision had so perturbed Alladi Krishnaswamy Ayyar that he wrote a letter to B.N. Rau saying that "the recent happenings in different parts of India have convinced me more than ever that all Fundamental Rights guaranteed under the Indian Constitution must be subject to public order, security and safety". Ayyar followed up this letter with a note to the Sub-Committee in which he suggested that if the rights were not made liable to suspension in times of emergency, then the words "security and defence of the State or national security" be added to the already existing proviso. This impliedly means that the subordination of Fundamental Rights to national security would serve the purpose of suspension of Fundamental Rights during an emergency.

The justification for this extraordinary provision of Emergency is that the individual liberties may have to be kept in abeyance temporarily if it is found necessary to meet the threat to the

security of India or any part thereof within the meaning of Article 352(1) of the Constitution. The present Constitutional provisions are also based on the mistaken notion that emergency activities cannot be carried on with the courts of the land exercising their jurisdiction. There is no basis for thinking that the judiciary in this country will fail to appreciate the needs for defending the security of the country. Though the defence of the country may primarily be an executive responsibility, to assume, as the Constitution has done, that emergency measures can only be taken if the courts are stripped of their authority or that the judges cannot be trusted, is clearly an unproven and unwarranted one.

Article 359 should be appropriately amended so as to exclude certain more Fundamental Rights from its purview. This suggestion can be justified because Part III of the Constitution includes such vital rights as freedom of conscience and religion. Under the Covenant on Civil and Political Rights, the right to religious freedom cannot be suspended even in a national emergency. Part III also includes minority rights to establish institutions, the right against exploitation, etc., which exist separately as human rights.

To conclude, it is difficult to improve upon the wise saying of Judge Learned Hand who observes: 'Liberty lies in the hearts of men and women; when it dies there, no Constitution, no Law, no Court can save it; while if it lives there it needs no Constitution, no Law, no Court to save it.'