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Balancing State Necessity and Fundamental Rights: Jurisprudential Insights on Article 34

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ABSTRACT

The Indian Constitution guarantees fundamental rights to citizens, safeguarding them against arbitrary state action. However, these rights are not absolute and may be curtailed during national emergencies or martial law. Article 34 assumes particular significance in such contexts, as it permits Parliament to indemnify governmental actions that might otherwise infringe fundamental rights. Such indemnity protects state authorities for measures undertaken to maintain law and order, even when those measures restrict individual liberties. The present study critically examines the constitutional and judicial dimensions of Article 34, its historical evolution and its implications for democratic governance. Through doctrinal analysis, a review of case law and comparative perspectives, the article highlights the tension between state necessity and individual freedoms. It proposes reforms to ensure accountability and constitutional balance.

Keywords: Article 34, Indemnity, Constitutional Accountability, Democratic Governance

I. INTRODUCTION

The Constitution of India embodies the principles of democracy, liberty, equality and justice. Within this framework, Article 34 addresses indemnity for actions taken while martial law is in force. It permits Parliament, by law, to indemnify any person in the service of the Union or of a State, or any other person, for acts done in connection with the maintenance or restoration of order in an area where martial law was in force, and to validate sentences, punishments, forfeitures and other acts done under martial law in that area.¹ An indemnity law of this kind shields those who act for the State from legal liability for measures that may infringe fundamental rights but are deemed necessary to restore order.

This provision raises critical questions about the balance between state authority and individual freedoms. While national security and stability are paramount, the protection of constitutional rights remains the cornerstone of democracy. Article 34, though designed only for exceptional circumstances, has profound implications for governance, accountability and the preservation

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¹ INDIA CONST. art. 34.

of fundamental rights. Indemnity provisions trace their origins to colonial governance, where laws shielded officials from liability for acts done during uprisings such as the Revolt of 1857. Recognising the need for extraordinary measures in extreme circumstances, the framers of the Indian Constitution incorporated Article 34. It empowers Parliament to indemnify acts committed during martial law. In the Constituent Assembly, Shibban Lal Saksena, who feared that the provision would encourage officers to commit excesses, moved for its deletion, and Brajeshwar Prasad, supporting it, answered that the power lay with Parliament, which could refuse indemnity to officers who had acted beyond what martial law required.²

II. RESEARCH METHODOLOGY

The study adopts a doctrinal research approach, relying on constitutional provisions, judicial precedents and scholarly literature. Primary sources include the Constitution of India, Supreme Court and High Court judgments, and the Constituent Assembly Debates. Secondary sources encompass academic commentaries, journal articles and reports on human rights. This methodology enables a comprehensive understanding of the scope, application and impact of Article 34.

III. PURPOSE OF THE STUDY

The central objective is to explore the effects of indemnity under Article 34, particularly its influence on fundamental rights and democratic governance. The study seeks to evaluate how indemnity provisions reconcile the dual imperatives of maintaining public order and safeguarding individual liberties.

IV. CONCEPT OF INDEMNITY

Indemnity, in legal parlance, denotes protection against liability or damage. Within constitutional law, it functions as a safeguard for state actors who undertake extraordinary measures during crises. Article 34 of the Indian Constitution embodies this principle by permitting Parliament to indemnify officials and other persons for actions taken during martial law, an idea rooted in the doctrine of state necessity. The rationale is that governance must continue even in times of upheaval, and those entrusted with maintaining order should not be deterred by fear of subsequent litigation.³

² 11 CONSTITUENT ASSEMBLY DEBATES (Nov. 14, 1949) (motion of Shibban Lal Saksena to delete the article as encouraging excesses; statements of H.V. Kamath and Brajeshwar Prasad), <https://www.constitutionofindia.net/debates/14-nov-1949/>; 11 CONSTITUENT ASSEMBLY DEBATES (Nov. 16, 1949) (statement of B.R. Ambedkar) (explaining that without the article, arts. 20(1) and 21 would make the administration of martial law impossible; the motion for deletion was negatived), <https://www.constitutionofindia.net/debates/16-nov-1949/>.

³ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1326 (7th ed. 2014).

Historically, indemnity provisions evolved from English common law and colonial governance, where they were used to shield administrators during uprisings such as the Revolt of 1857.⁴ In India's constitutional framework, indemnity reflects a compromise between executive necessity and constitutional accountability. While it ensures continuity of governance, critics argue that it risks enabling human rights violations under the pretext of security.⁵ Unchecked indemnity can erode democratic foundations, and any indemnity must therefore remain subject to constitutional limits. Thus, indemnity under Article 34 is not merely a technical provision but a deeply contested principle balancing the imperatives of state security with the preservation of individual liberties.

V. JUDICIAL PERSPECTIVE ON ARTICLE 34

The leading decisions on emergency powers indicate that indemnity cannot be treated as absolute and must be interpreted within the larger constitutional framework. Three guiding principles can be drawn from them:

1. **Indemnity cannot justify arbitrary or disproportionate actions:** indemnity provisions are meant to protect necessary actions taken in good faith, not to legitimise excessive or unconstitutional conduct.
2. **Judicial scrutiny remains essential, even in extraordinary circumstances:** courts retain the authority to examine whether actions covered by indemnity conform to constitutional standards. This ensures that indemnity does not become a blanket immunity from accountability.
3. **Fundamental rights and the basic structure set the outer limit:** Article 34 operates “notwithstanding anything in the foregoing provisions” of Part III, so the protection lies in construing any indemnity law narrowly and consistently with the basic structure of the Constitution and the inviolability of fundamental rights.

VI. JURISPRUDENCE AND LANDMARK CASES

The case law on emergency powers reflects the judiciary's struggle to reconcile state necessity with constitutional guarantees. None of the following decisions concerned Article 34 directly,

⁴ See, e.g., Government Officers' Indemnity Act, 1860, Act No. 34 of 1860 (India) (indemnifying officers of Government and other persons for acts done “during the late disturbances”); Indemnity Act, 1919, Act No. 27 of 1919 (India) (indemnifying officers of Government and other persons for acts done under martial law in 1919).

⁵ See 11 CONSTITUENT ASSEMBLY DEBATES (Nov. 14, 1949) (statement of Shibban Lal Saksena) (objecting that the article “will encourage officers working in the martial law area to commit excesses and hope for indemnification by an Act of Parliament”), <https://www.constitutionofindia.net/debates/14-nov-1949/>.

but each illustrates how the courts have limited extraordinary powers, and so indicates how an indemnity law would be read:

- *ADM Jabalpur v. Shivakant Shukla*⁶ (1976): During the Emergency proclaimed in June 1975, the Supreme Court held by a majority of four to one that, while the Presidential Order of 27 June 1975 under Article 359(1) was in force, no person could move a High Court for habeas corpus to challenge an order of detention, even on the ground that it was illegal or mala fide. The decision effectively insulated executive detention from judicial scrutiny and was widely criticised as a setback to constitutionalism. Justice H.R. Khanna's dissent, however, became a beacon of judicial conscience, insisting that "even in the absence of article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law".⁷ The Constitution (Forty-fourth Amendment) Act, 1978 later amended Article 359 so that the enforcement of Articles 20 and 21 can no longer be suspended during an Emergency,⁸ and in *K.S. Puttaswamy v. Union of India* the Supreme Court overruled *ADM Jabalpur* and accepted Justice Khanna's view.⁹
- *Kesavananda Bharati v. State of Kerala*¹⁰ (1973): Though not directly about Article 34, this case established the basic structure doctrine, under which Parliament's power to amend the Constitution cannot be used to destroy core constitutional principles such as the rule of law. This doctrine limits indemnity provisions only indirectly: it would prevent Article 34 itself from being amended into a blanket immunity for state actors that destroyed those principles.
- *Makhan Singh v. State of Punjab*¹¹ (1963): Addressing preventive detention during the 1962 Emergency, the Court held that a Presidential Order under Article 359(1) suspends only the remedy for the rights it names, so that a detenu may still challenge detention on grounds outside the Order, such as a mala fide exercise of power. The Court thus acknowledged the limited scope of judicial review but emphasised that state actions must remain within constitutional and statutory boundaries. This reasoning applies to indemnity under Article 34, suggesting that immunity cannot justify arbitrary or excessive conduct.

⁶ *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207 (India).

⁷ *Shivakant Shukla*, *supra* note 6 (Khanna, J., dissenting).

⁸ The Constitution (Forty-fourth Amendment) Act, 1978, § 40 (India); INDIA CONST. art. 359(1).

⁹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

¹⁰ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 (India).

¹¹ *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 (India).

- *Indira Gandhi v. Raj Narain*¹² (1975): In the context of electoral malpractice, the Court struck down clause (4) of Article 329A, inserted by the Constitution (Thirty-ninth Amendment) Act, 1975 to place the Prime Minister's election beyond challenge, and reinforced that constitutional principles such as democracy and the rule of law cannot be undermined even by constitutional amendment. Chief Justice Ray also declined to extend the basic structure doctrine to ordinary legislation,¹³ so an indemnity law made under Article 34 would be tested against the terms of that article. The judgment nevertheless bears on Article 34 by stressing that measures placing state action beyond scrutiny must themselves remain subject to judicial review.
- *State of Rajasthan v. Union of India*¹⁴ (1977): Examining the President's power under Article 356 after the Union proposed to dissolve several State Legislative Assemblies in 1977, the Court declined to interfere, but held that the President's satisfaction could be examined if it was shown to be mala fide or based on wholly extraneous and irrelevant grounds. By analogy, indemnity under Article 34 cannot be exercised arbitrarily and must conform to constitutional checks and balances.

Together, these cases demonstrate that while Article 34 provides a framework for extraordinary measures, its application is circumscribed by constitutional doctrines that safeguard democracy and individual rights.

VII. EFFECTS ON FUNDAMENTAL RIGHTS

Indemnity under Article 34 has profound implications for fundamental rights:

- **Suspension of liberty:** By shielding state actors from liability, indemnity provisions can curtail rights such as personal liberty under Article 21. During martial law, curfews, detentions and restrictions on movement may be indemnified, raising concerns about unchecked executive power.
- **Equality concerns:** Article 14 guarantees equality before the law, but indemnity provisions risk creating a parallel legal regime in which state actors are exempt from accountability. This undermines the principle of equal protection.
- **Freedom of speech and association:** Indemnity may justify restrictions on speech, the press and assembly during crises. While such measures may be necessary for public order, their blanket protection under indemnity threatens democratic discourse.

¹² *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 (India).

¹³ *Indira Nehru Gandhi*, *supra* note 12 (Ray, C.J.).

¹⁴ *State of Rajasthan v. Union of India*, AIR 1977 SC 1361 (India).

- **Judicial review:** Perhaps the most significant impact is on the right to constitutional remedies under Article 32. If indemnity shields actions from judicial scrutiny, citizens lose their ability to challenge violations, weakening the enforcement of rights.

Thus, indemnity provisions, though designed for exceptional circumstances, risk eroding the very foundation of constitutional democracy if they are not carefully limited.¹⁵

VIII. ROLE OF THE JUDICIARY IN BALANCING RIGHTS AND INDEMNITY

The judiciary serves as the guardian of constitutional values,¹⁶ tasked with ensuring that indemnity provisions do not become instruments of authoritarianism. Its role can be summarised in four dimensions:

1. **Interpretive safeguards:** Indemnity is not absolute. Judicial interpretation ensures that indemnity applies only to actions genuinely necessary for restoring order, not to arbitrary or disproportionate measures.
2. **Basic structure doctrine:** By invoking the doctrine, the judiciary ensures that the indemnity power cannot be enlarged by constitutional amendment so as to destroy judicial review or the core of fundamental rights. This doctrine acts as a constitutional firewall against misuse.
3. **Judicial activism:** In post-Emergency jurisprudence, courts have adopted a more activist stance, scrutinising state actions even during crises. This activism reflects the moral imperative to protect rights against executive excess.
4. **Comparative constitutionalism:** Indian courts have occasionally drawn on international human rights standards, reinforcing that indemnity must align with global norms of accountability and justice.¹⁷

IX. PROPOSED REFORMS AND POLICY RECOMMENDATIONS

- **Codified safeguards:** One of the foremost reforms required in the context of Article 34 is the codification of clear statutory safeguards. Article 34 is framed in broad terms, leaving scope for arbitrary application of any indemnity law made under it. By enacting detailed legislation that defines the precise circumstances under which indemnity may be granted, Parliament can ensure that such provisions are not misused. Codified safeguards would also establish procedural requirements, such as mandatory

¹⁵ Cf. 11 CONSTITUENT ASSEMBLY DEBATES (Nov. 14, 1949) (statement of H.V. Kamath) (objecting that extending the indemnity to “any other person” was “far too sweeping”), <https://www.constitutionofindia.net/debates/14-nov-1949/>.

¹⁶ I D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 423–30 (9th ed. 2015).

¹⁷ S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 67–75 (2002).

documentation of actions taken under martial law, thereby creating a transparent record that can be scrutinised later. This would prevent indemnity from becoming a blanket shield for executive excesses.

- **Judicial oversight:** A second reform involves strengthening judicial oversight of indemnity laws. The judiciary must be empowered to review the validity and proportionality of indemnity provisions enacted by Parliament. Mandatory constitutional review would ensure that indemnity clauses do not undermine the basic structure of the Constitution or erode fundamental rights. Judicial oversight would also provide a mechanism for citizens to challenge indemnity laws that appear to legitimise violations of liberty, equality or due process. In this way, courts would act as a constitutional safeguard, ensuring that indemnity remains a measure of necessity rather than a tool of impunity.
- **Human rights protections:** The integration of international human rights standards into the application of Article 34 is another critical reform. India is a party to several international conventions that emphasise accountability, proportionality and the protection of civil liberties even during emergencies.¹⁸ Incorporating these standards into domestic law would ensure that indemnity provisions do not legitimise human rights violations. For instance, indemnity should never extend to acts such as torture, extrajudicial killings or arbitrary detention, which are prohibited under international law. Embedding human rights protections within the framework of Article 34 would align India's constitutional practice with global norms of justice and accountability.
- **Transparency and parliamentary accountability:** Finally, transparency in the enactment and application of indemnity provisions is essential. Parliament must be held accountable through mechanisms such as mandatory reporting, open debates and periodic review of indemnity laws. This would ensure that indemnity provisions are not passed in secrecy or without adequate scrutiny. Transparency also strengthens democratic legitimacy, as citizens can evaluate whether indemnity is being used appropriately. Parliamentary accountability, combined with public debate, would act as a check on executive power, ensuring that indemnity provisions serve their intended purpose of maintaining order without eroding constitutional freedoms.

¹⁸ See, e.g., International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 (permitting derogation in a public emergency only to the extent strictly required by the exigencies of the situation, and never from, among others, arts. 6 and 7). India acceded to the Covenant on 10 April 1979.

X. CONCLUSION

The indemnity provision under Article 34 of the Indian Constitution represents one of the most complex intersections between state necessity and constitutional liberty. Conceived as a safeguard during extraordinary circumstances such as martial law, it reflects the framers' recognition that governance must continue even in times of crisis. Yet its very existence raises profound questions about accountability, the scope of executive power and the resilience of fundamental rights.

The case law bearing on Article 34 demonstrates the judiciary's evolving role in curbing potential misuse. *ADM Jabalpur v. Shivakant Shukla* revealed the dangers of unchecked emergency power, where fundamental rights were subordinated to executive necessity. *Kesavananda Bharati* and *Indira Gandhi v. Raj Narain*, both decided before it, had already established that even the amending power cannot destroy the basic structure of the Constitution, and *K.S. Puttaswamy* has since overruled *ADM Jabalpur*, confirming judicial review as a non-negotiable safeguard. These cases underscore the judiciary's responsibility to ensure that indemnity provisions remain measures of necessity rather than instruments of impunity.

A comparative perspective further highlights India's distinctive constitutional approach. Unlike the UK, where indemnity is statutory and subject to human rights frameworks, or the USA, where no constitutional indemnity clause exists and accountability is reinforced through litigation, India's Article 34 explicitly constitutionalises indemnity. This broad formulation makes it more vulnerable to misuse unless tempered by judicial vigilance and legislative safeguards. The lesson from these jurisdictions is clear: indemnity must be narrowly tailored, proportionate and always subject to oversight.

The effects of indemnity on fundamental rights cannot be overstated. By shielding state actors from liability, an indemnity law under Article 34 risks curtailing liberties such as personal freedom, equality and judicial remedies. If applied without restraint, it threatens to erode the very foundation of constitutional democracy. The judiciary's role is therefore pivotal in striking a balance: allowing the State sufficient flexibility to maintain order, while ensuring that such flexibility does not undermine the inviolability of rights.

Looking forward, reforms are essential to align Article 34 with democratic values. Codified safeguards, judicial oversight, integration of international human rights standards and parliamentary transparency must be institutionalised. These measures would ensure that indemnity provisions serve their intended purpose of preserving order during crises, without becoming a shield for authoritarian excess.

In conclusion, Article 34 embodies both the necessity and the danger of extraordinary constitutional measures. Its continued relevance lies not in its unchecked application, but in its careful circumscription within the framework of constitutional democracy. By reinforcing accountability, embedding human rights protections and sustaining judicial vigilance, India can ensure that indemnity provisions remain compatible with the ideals of liberty, equality and justice. Only then can Article 34 fulfil its role as a safeguard in times of crisis without compromising the enduring values of the Constitution.
