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Emergency Provisions of Indian, Pakistan & Weimar Constitutions

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ABSTRACT

In any nation there are probabilities of having external or internal aggression or wars which might hamper the peace of a country by breaching the security of the entire nation or particular state or will cause a hindrance to the daily activities of the country creating a sense of chaos. In order to avoid a state of belligerency among nations and to protect the internal peace and harmony of the country by also making sure the government gets the support of its citizens, many nations have come up with concept of emergency in their constitution. There arises a need to comparatively study the emergency provisions and situations in each nation and decide which emergency provision has been successful in tackling situations such as war and internal aggression by also protecting the rights of the nation. The research paper on the topic "Emergency provisions of Indian, Pakistan and Weimar Constitutions" was taken with the intent of comparative analysing the emergency provisions in the countries of Pakistan, Weimar and India. The research paper will discuss the history of emergency provisions, the situations in the countries under which an emergency can be declared, the provisions dealing with emergency provisions in the countries, the impact of the emergency provisions on the nations, concepts such as political policing, federalism and emergency provisions etc. The paper also lays emphasis on the judicial interpretation of emergency in India, Pakistan and Weimar.

Keywords: *Emergency provisions, India, Weimar, Pakistan, constitution, federalism.*

I. INTRODUCTION

The emergency provisions in India have given rise to presidential rule which is explained in part eighteen of the constitution². This provision in Indian constitution which are relate to the emergency provisions are inspired and implemented from the constitution of Weimar which was already adopted in the year 1919³. In the Weimar constitution article 48 states that the president of Weimar can declare emergency in the country without the approval given by the

¹ Author is a student, India.

² English text of the constitution of 1949 as amended to 2006 217 (1950) Part XVIII: Emergency Provisions

³ David Cole, The Priority of Morality: The Emergency Constitution's Blind Spot, 113 Yale L.J. 1753 (2004).

lower house of the republic of Weimar or the Reichstag. Only partial invasions on the on the fundamental rights of the people of Weimar will be endorsed⁴. The judges' or federal constitutional courts' performance of constitutional functions and the constitutional status will not be impaired during an emergency⁵. Since Pakistan was part of India till 1947 the constitutions of both countries has the essence of colonial times. In Pakistan's constitution the article from 232 to 237 talks about emergency provisions which can only be declared by the president⁶. The government can proclaim such an emergency in cases of internal disturbance in the country or if the country is facing a war or due to any instability in finance. It will only be considered as the last resort in any country⁷. The emergency provisions in the countries of India, Weimar and Pakistan are going hand in hand and are almost similar in nature with the ulterior motive of bringing the state under the control of centre for better administration⁸.

II. HISTORICAL BACKGROUD OF THE EMERGENCY PROVISIONS IN THE COUNTRIES OF WEIMAR, PAKISTAN AND INDIA

The constitutional systems across the world differ in the usage of subject matters of emergency powers especially with the difference in the period of the formation of constitution and with the situations in the country prior to the drafting of the constitution. Newly drafted constitutions contain more detailed and clear emergency provisions when compared to older constitutions which are mostly ambiguous.⁹The circumstances under which a which the safety of the nation can be endangered is quite large and hence most countries have statutory provisions to deal with emergency situations. Several constitutions throughout the world get inspired by the constitutions of other countries and borrow ideas from these constitutions.

(A) Constitution of Weimar

The constitution of Weimar has given much emphasis on the concept of emergency provisions and the safety of the country. Germany consisted of a collection of duchies, kingdoms, states until the 19 the century after which it became unified as a nation.¹⁰ By 1815, with the defeat of Napoleon the German confederation which mostly resembled a treaty community composed

⁴ 115c(2)(1)-(2) of Basic law for the federal republic of Germany

⁵ A. P. Blaustein, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY* 87 (Oceana Publications Gisbert H. Flanz ed., 2003)

⁶ Pakistan. Constitution of the Islamic Republic of Pakistan (1956).

⁷ Supra note 7.

⁸ Faryal Nazir, *Constitutional Design of Emergency Provisions: A Comparative Analysis of Pakistan and India*, 1 *LUMS L.J.* 1 (2014).

⁹ Ackerman, Bruce. "The Emergency Constitution." *The Yale Law Journal* 113, no. 5 (2004): 1029-091.

¹⁰ *Id.*

of 39 sovereign states with the motive of taking the place of Roman Empire¹¹. Following which came the March revolution in 1848 where uprisings for fundamental rights began in various states of German and hence an act which guaranteed basic rights to the citizens were passed by the Frankfurt parliament and then in 1849¹² the parliament adopted the Frankfurt constitution but it failed due to variety of reasons primarily because of the difference in opinion and rivalry between Austria and Prussia¹³. In 1867 the North German confederation was dissolved and a new constitution was formed due to the Austro-Prussian war. Until the German revolution in 1918 from 1871 the German Empire lasted. After which the constitution of Weimar replaced the constitution of German Empire. There were large-scale strikes in Germany among the mutinies and factory workers right within the armed forces which was the result of hunger-plague and poverty because of the First World War. Germany was been functioned under the military dictatorship with supreme commanders as Erich Ludendoff and Paul von Hindenburg. But with the forthcoming defeat in 1918 the German government along with Kaiser Willem II was pushed by Hindenburg to discuss a treaty with the Allies¹⁴. Thus the treaty of Versailles which was regarded as the 'Peace without Victory' was signed in 1918, which brought an end to the First World War but stated internal conflicts within Germany since many of its citizens found it an insult and humiliation further Germany was held responsible for the world War 1 thus imposing harsh penalties on German¹⁵.

The Weimar constitution was signed on 11th of August 1919 by Friedrich Ebert who was from the Socialistic Democratic Party and the first president of Germany. He was the strong pillar behind the unification of Germany after the defeat of Germany Emperor in World War. The constitution of Weimar also provided the president with considerable power and authority over the armed forces and foreign forces¹⁶. Further the emergency provisions also gave the president enormous power especially to protect the Republic of Germany from the chaos caused by the lefts and rights, either of the opponents. It was a major blow during the time of Hitler since he used the article 48, the emergency provisions to pass laws without conducting any consultations with the Reichstag and this also yielded a tough deal in Treaty of Versailles¹⁷. Article 48

¹¹ KATER, MICHAEL H. *Weimar: From Enlightenment to the Present*. Yale University Press, 2014. Accessed October 28, 2020.

¹² *Id.*

¹³ Hamerow, Theodore S. "History and the German Revolution of 1848." *The American Historical Review* 60, no. 1 (1954): 27-44.

¹⁴ Van Ginneken, Jaap. "1919-1933: The Weimar Republic and the Mass Press." In *Kurt Baschwitz*, 115-48. Amsterdam: Amsterdam University Press, 2018.

¹⁵ KATER, MICHAEL H. "Weimar in the Weimar Republic: 1918 to 1933." In *Weimar: From Enlightenment to the Present*, 165-211. Yale University Press, 2014.

¹⁶ Peter Caldwell, Legal Positivism and Weimar Democracy, 39 *Am. J. Juris.* 273 (1994).

¹⁷ *Id.*

allowed the President to operate independently and to suspend all the civil rights of citizens. The government was not successful in improving the deteriorating situations in Germany which was the result of the Versailles treaties and First World War. The government tried to resolve the difficulties caused in treaty but it resulted in unemployment and economic distress. This was the reason of rise of the Nazi party headed by Adolf Hitler and the Second World War. The Weimar constitution and its government struggled to stand a chance under the vicious attacks from the racial socialists left and militarist right¹⁸. With the appointment of Hitler as the Chancellor, there was a lot of misuse of power of the article 48 and later by the 1933 the Weimar constitution came to an end¹⁹.

(B) Constitution of India

India is a country which has a written constitution of its own, which was adopted by the country in the year 1949.²⁰ It is known to be the largest constitution compared to other constitutions in the world with a total of eight schedules and 395 articles at the time when it was drafted.²¹ The constitution was drafted by the framers within a period of three years. Even though the constitution is unique in its spirit, the framers of the Indian constitution referred and studied the constitutions of other countries and got inspired by certain areas or provisions of the constitution and hence while drafting the constitution of India these were kept in mind by the framers²². The Indian constitution replaced the government of India act of 1935 which was considered as the interim constitution. The government of India also had emergency provisions as per Section 12(1) of the act even though it was not enacted to protect the constitutional order. In order for the President of India to encounter any extraordinary situations like wars or armed rebellion or external aggression effectively, the constitution of India contains detail provisions to deal with such situations. These provisions are incorporated in order to safeguard and protect the unity, security, integrity, sovereignty and independence of the country. The provision which deals with the suspension of Fundamental rights during the emergency was inspired and borrowed from the Constitution of Weimar²³. The articles 352 to 360 talk about emergency provisions in India which is mainly National emergency, State emergency, and financial emergency. Even though the constitution of Weimar failed to exist the essence of its emergency provisions were used by many countries.

¹⁸ Schweitzer, C. C. "Emergency Powers in the Federal Republic of Germany." *The Western Political Quarterly* 22, no. 1 (1969): 112-21.

¹⁹ *Id.*

²⁰ Wallace, D. D. "The Indian Constitution of 1949." *The Journal of Politics* 13, no. 2 (1951): 269-75.

²¹ *Id.*

²² *Id.*

²³ Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 Yale L.J. 1801 (2004).

1. Constitutional assembly debates

The members of the constituent assembly had conducted several debates on the draft of emergency provisions from August to October 1949. During this session political experiences and emergency provisions of other countries were referred especially the countries of United Kingdom, Weimar, unites states etc. On November 4th 1948, B.R Ambedkar while giving his historic speech addressed one of the common criticism in the constitution that as per the draft the centre assumed more power than the state government²⁴. He also added that such a centralization of power in the modern world is unavoidable. H.V Kamath came up with an criticism against the drafting committee that it copied the Emergency power act, 1920 of UK.²⁵ He also brought into the notice of the parliament the chances of misuse as happened in Weimar where Hitler used it for his dictatorship rule so he asked for safeguard of misuse of the provisions by the future government²⁶. He was of the opinion that India should come up with some better provisions than UK since there performance during the emergency proclaimed during World War 2 was insignificant. T.T Krishnamachari was of the opinion that the purpose of emergency provisions is to protect the constitution but there is high chance of misuse and the government should be sufficiently empowered²⁷.

2. Types of emergencies

National emergency- Article 352, requires the President to declare an emergency if he is convinced that there is a significant crisis in India or any portion of its territories, whether by armed rebellion, war or external aggression.²⁸ The Union is permitted to command, and Parliament is permitted to legislate for, every State after such a proclamation²⁹. This kind of emergency can be proclaimed in whole or any part of the country. The president can order for suspension of fundamental right especially article 19 a put censorship on news but article 21 and 20 cannot be suspended³⁰. During the emergency the Fundamental rights which are guaranteed by article 19 and 14 are operational and not suspended and after the emergency is lifted any law or act which goes against these articles will be struck down³¹. As per Makhan singh v. St. Punjab³², a person can approach the Supreme Court on the grounds of writ of Habeas Corpus or the challenge before court can be made on grounds not mentioned in the

²⁴ *Occasional Papers/Reprints Series in Contemporary Asian Studies*, Vol. 1988, Issue 6 (1988), pp. 56-98

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *supra note 13.*

²⁹ Constitution of India 1950, arts 353(a) and 353(b).

³⁰ Constitution of India 1950, art 359(1)

³¹ M.M. PATHAK V. UOI (AIR1978 SC803)

³² Makhan Singh v. St. of Punjab (AIR1964 SC381)

presidential order. In the case of *Dr. Ram Manohar Lohia v. State of Bihar & Ors*³³ the court held that the expression “any courts” shall include Supreme court and High court under article 32 and article 226 respectively. This implies that article 359(1) applies to both Supreme court and High court.

State emergency- As per article 356 the president can declare an emergency if he is satisfied that there is a constitutional breakdown and that any particular state does not comply with the rules of the constitution³⁴. The President will 'assume all or any of the duties of the state government' for himself, and that the powers of the State Legislature shall be authorized by or under the control of Parliament³⁵. The legislative power of state can be delegated to the president by the Parliament³⁶.

Financial emergency- The third exceptional condition predicted in Part XVIII is that of a financial emergency. Article 360 requires the President to announce an emergency when he is 'satisfied that a circumstance has occurred in which India or some portion of its jurisdiction is at risk of financial security or credit'. This kind of emergency has not been proclaimed till now in India.³⁷

3. Amendments to the constitution regarding emergency provisions

The 44th amendment had a major impact on the emergency provisions of the constitution. Before the 44th amendment the article 352 was vague and ambiguous and also it granted way too much power to the central government especially the president and Prime Minister.³⁸ Thus the 44th amendment made the article transparent and also reduced the power of the Prime Minister and made it mandatory for the Prime Minister and the cabinet to give the President a written explanation stating the reason for the proclamation of emergency under 352³⁹. Most importantly the 44th amendment has made the requirement of special majority instead of simple majority for the proclamation of emergency and the period in which the proclamation comes to end in the absence of required vote was reduced to one month.⁴⁰ The review of emergency proclaimed shall be done every six months in both the houses. The amendment also amended the article 359 and hence made it possible for anyone to approach the supreme court for writ of Habeous Corpes.

³³ *Dr. Ram Manohar Lohia v. State of Bihar & Ors* (1966) 1 S.C.R. 709

³⁴ Constitution of India 1950, art. Article 356

³⁵ Constitution of India 1950, arts 356(1)(a) and 356(1)(b).

³⁶ Constitution of India 1950, art 357(1)(a).

³⁷ *supra note 14.*

³⁸ *supra note 14.*

³⁹ Rahul Sagar, *Emergency Powers*(2011)

⁴⁰ *supra note 14.*

(C) Constitution of Pakistan

The separation of Pakistan from India resulted in the formation of two independent countries by 1947 August 15th. Since the creation of Pakistan, the country spends several years under the military rule. The article from 232 to article 237 deals with the emergency powers in the country of Pakistan. The emergency provisions of constitution of Pakistan are almost similar to that of Indian constitution and Weimar constitution. The fundamental rights of citizens will be suspended during the proclamation of emergency and the entire power comes to centre government. Pakistan has worked under the Unrepealed constitutional legislation, the Government of India act, 1935⁴¹. On the other side, Pakistan declared its Republican status because of social and political unrest in 1956. There were two additional constitutions in Pakistan, one in 1973 and another in 1962 as result of repeal of the Constitution of Pakistan 1956.⁴² The new constitution gives the president of Pakistan a lot of discretionary powers to dismiss the national assembly and prime minister⁴³. Many such powers were removed by the 18th and 13th amendment of the constitution. Pakistan became a completely centralised state under military control, since while the official documents tended to define the nation as a federal state, the military regime was not bound to any Constitution and was sole authority over both provincial and federal regimes.⁴⁴ The Constitution of Pakistan requires the President of Pakistan to impose an emergency when it is convinced that there is a condition which requires its implementation⁴⁵. If the President of Pakistan announces a state of emergency, it must be accepted by the National Assembly within 30 days.⁴⁶

1. Constitutional Assembly Debates

The constituent assembly adopted first constitutional document of Pakistan but the only Hindu minority party; Pakistan National Congress opposed this resolution. Later in 1956 a Constitution was promulgated by Chaudhary Muhammad Ali but was repealed by general Ayub Khan and marital laws were imposed on the country. Marital law was again imposed in 1969 when General Muhammad Yahya Khan was in power⁴⁷. It was in 1973 August 14 that the Constitution of Pakistan came into full effect which was ratified unanimously in the National Assembly.⁴⁸ But in 1977 the provisional, legislative assemblies and central

⁴¹ Mark M. Stavsky, The Doctrine of State Necessity in Pakistan, 16 Cornell Int'l L.J. 341 (1983).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *supra note 11.*

⁴⁵ Constitution of Pakistan, 1973 art.232

⁴⁶ *supra note 11.*

⁴⁷ Choudhury, G. W. "The Constitution of Pakistan." *Pacific Affairs* 29, no. 3 (1956): 243-52.

⁴⁸ *Id.*

government was dismissed and the constitution was suspended. After which emergency was declared a couple of times in Pakistan. Pakistan and India abide by the executive model of emergency which has been used during the colonial times.⁴⁹

2. Types of Emergencies

1. Proclamation of emergency on basis of internal disturbance beyond the power of provisional government, external aggression, war (Article 232-233)
2. Proclamation of emergency in a Province due to failure of constitutional machinery (article 234)
3. Proclamation of emergency in case of a financial crisis.(article 235)

III. FEDERALISM AND EMERGENCY PROVISIONS

In general description, federal governments are two-tier systems wherein the functions of the federal and the national or state governments are specified in a constitutional text. A word which is derived from the word "FOEDUS" meaning agreement is a system by which there is division of powers between centre and state government⁵⁰. As per the definition given by K.C Wheare federalism is the method of dividing power for the proper co-ordination of the duties of the state and central government.⁵¹ It is also important to note that in this system both the government will be on equal footing and not subordinate to one another⁵². Further each government will be independent in their own sphere, which means they would not interfere in one another's matter. The definition given by Dr. Garner federalism is almost similar to that of K.C wheare which means that all the powers are divided between state government and central government where both will be supreme in their respective spheres⁵³. It is one of the basic structure on which the constitution of a feral country operates.⁵⁴ If the provision of emergency is observed it could be understood that during a period of emergency the power shifts to the centre which deteriorates from the concept of division of power. Weimar is a federal republic since there is division of powers between the Reichstrat⁵⁵ and the Reichstag⁵⁶ and both were unique in their respective sphere⁵⁷. Pakistan is a federal republic which is known the Islamic

⁴⁹ *Id.*

⁵⁰ Paleker, S. A. "FEDERALISM : A CONCEPTUAL ANALYSIS." *The Indian Journal of Political Science* 67, no. 2 (2006): 303-10.

⁵¹ *Id.*

⁵² Stevenson, Garth. "The Meaning of Federalism." In *Unfulfilled Union, 4th Edition: Canadian Federalism and National Unity*, 1-19. McGill-Queen's University Press, 2009.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Constitution of Weimar, 1919 art 60

⁵⁶ Constitution of Weimar, 1919 art 20

⁵⁷ *supra* note 18.

Republic of Pakistan⁵⁸. It was quite obvious why Pakistan choose to be a federal form of government rather than being a unitary form. Since Pakistan is there in the far East and Middle east it was difficult for it to form an union and hence it could be understood that there is lack of geographical continuity and it is the religious bond which unites the two wings⁵⁹. In South Asia and especially in India and Pakistan, federalism has an unique nature and because of the success and execution of their federal policies, diverse backgrounds and the extent of democratisation⁶⁰. The distinction in the federal framework of the two nations in their constitutional and regional political structure, it is visible. The differentiation can be determined by the degree of consociation suggested before autonomy within the federal plans, after independence and their success, the constitutions established. Both in Pakistan and India, federalism in respect to failed emergency and constitutional machinery can be observed back from the historical roots⁶¹. Federalism is the foundational promise of the Constitution of Pakistan but in reality the military and governmental rule and the frequent proclamation of emergency is making it almost impossible. In fact federalism in Pakistan is only in works but not in reality.⁶² The 1972 constitution failed to provide sustainable and equitable power sharing in Pakistan. Right from the independence of Pakistan as per the interim constitution which is similar to the sec 45 of the government of India act, the centre had very strong control and power over the provinces and states⁶³. But as per the emergency provisions of all the three countries the centre shall have ultimate power over the state government.

IV. CONTROVERSIAL EMERGENCIES AND CIRCUMSTANCES UNDER WHICH EMERGENCY PROVISIONS WERE DECLARED

(A) Emergency proclaimed in Weimar

The recovery of Weimar from the hyperinflation and severe unemployment caused by the aftereffects of World War 1 and treaty of Versailles was tackled by the Dawes plan in 1923 which led to the German economy to be flooded with American dollars.⁶⁴ On 1929 the great depression happened due to the crash of U.S stock market which led to the destruction of lately

⁵⁸ Panch Rishi Sharma, Comparative Federalism with Reference to Constitutional Machinery Failure (Emergency) in India and Pakistan, 4 BRICS L.J. 71 (2017).

⁵⁹ PANCH RISHI DEV SHARMA,, COMPARATIVE FEDERALISM WITH REFERENCE TO CONSTITUTIONAL MACHINERY FAILURE (EMERGENCY) IN INDIA AND PAKISTAN(Brics law Journal, 2017)

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *supra note. 47.*

⁶⁴ *supra note 18.*

recovered Weimar Republic.⁶⁵ After which the citizens of the German wanted a strong leadership and wanted to out throw communist party and this paved the way for the extremist Nazi party headed by Adolf Hitler who became Chancellor in 1933.⁶⁶ Hitler in order to get unlimited power and unhindered opposition signed the “emergency decree on 28th February 1933 for the Protection of German People”⁶⁷ which helped him overthrow the opposition communist party by encouraging anti-communism and propagating that the communist party is organizing a national uprising to defeat the Weimar republic which led to arrest of thousands of communist party leaders⁶⁸. This also suspended the civil rights such as right to trial before imprisonment, right to property and speech and the concept of democracy of the republic.⁶⁹ This paved the way for Hitler’ dictatorship rule and arrest of innocents without no reason. On 1933, 23rd of march Hitler also proposed an act, Enabling law to Reichstag which enabled him to rule by decree instead of the normal process passing laws through the president and Reichstag⁷⁰. The law was passed by two-third votes by banning the communist party with the help of DNVP. *Gleichschaltung*, this act removed any person who is a non-Aryan descent from civil service and any judge who is not complying with the Nazi principles and was also applied in all government policies⁷¹. This infiltrated the government posts especially the police force led to political policing, which helped Hitler to maintain order in the country and also no keeping no check on the police brutality.

In Germany the Nazi political party assumed sole power and they used the emergency provisions for their own benefits by putting the lives of any in danger and destroying the Weimar Republic. The situation in Germany was a major example of how emergency could destroy an entire country.

(B) Emergency proclaimed in Pakistan

In the Republic of Pakistan a state of emergency was declared six times. The first emergency declared was in 1958 when Iskander Mirza was the president, this was done by suspending the constitution after which he was overthrown and general Ayub Khan assumed the role of President.⁷² The second emergency was declared when the president was Yahya Khan, he

⁶⁵ *supra* note 18.

⁶⁶ *supra* note 15.

⁶⁷ Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar*(Duke University Press Books, 2004)

⁶⁸ *Id.*

⁶⁹ *supra* note 15.

⁷⁰ *supra* note 19.

⁷¹ Sencer, Emre. "Fear and Loathing in Berlin: German Military Culture at the Turn of the 1930s." *German Studies Review* 37, no. 1 (2014): 19-39.

⁷² *supra* note 14.

dissolved all assemblies and declared martial law in the country⁷³. Muhammad Zia-ul-Haq who was the president in 1977 declared martial law and suspended constitution. In 1999 when Muhammad Rafiq tarar was the president and the general was Pervez Musharraf an emergency was declared wherein the armed forces of Pakistan ruled Pakistan and further the national assembly, the constitution and four provinces were suspended and the then all the political officials including the Prime Minister Nawaz sharif was dismissed and house arrested.⁷⁴ The declaration was to unnerve the raise of nuclear weapons in India⁷⁵. The most controversial emergency was declared in 2007 whereby Pervez Musharraf, the president general suspended the constitution against the sayings of article 6 of the Pakistan constitutions and the television news which were independent were blacked out and censorship was imposed.⁷⁶ The 2007 situation was almost similar to the one proclaimed in 1999 which has been legalized by the court by ruling in favour of the state in the name of serving welfare to its citizens. in the case of Syed Zafar Ali Shahv. Pervez Musharaff⁷⁷ case and Begum Nurrat Bhutto v. Chief of the Army staff⁷⁸. It started with the chief justice of Supreme court, Iftikhar Mohammed getting suspended which led to a nationwide protest but later he was restored⁷⁹. The streets and roads were filled with soldiers and police officers⁸⁰. The move taken by him was believed to be an effort to reaffirm his authority which was fading away especially in comparison with the growing opposition and a reply to the 'paralysis of government by judicial interference'⁸¹. Lawyers, judges were arrested which made the situation worse. But the court charged mushrraf with the highest punishment for the declaration of 2007 emergency⁸². The Constitution specifies that a judge may be suspended by the president from the bench only if he is found guilty of wrongdoing or incapable of fulfilling his duties by the Supreme Judicial Council. The Constitution does not, however, expressly grant the president any authority to suspend a member of the Supreme Court before the inquiry of the council⁸³. The constitution of Pakistan grants the Supreme Court the authority of statutory and constitutional review. Later in 2020 February a state of emergency was declared due to the locust attack in the country. An analysis

⁷³ Neocleous, Mark. "From Martial Law to the War on Terror." *New Criminal Law Review: An International and Interdisciplinary Journal* 10, no. 4 (2007): 489-513.

⁷⁴ *supra* note 14.

⁷⁵ *Id.*

⁷⁶ *supra* note 14.

⁷⁷ Syed Zafar Ali Shah v. Pervez Musharaff PLD 2000 SC 86

⁷⁸ Begum Nurrat Bhutto v. Chief of the Army staff PLD 1977 SC 657

⁷⁹ Chief Justice of Pakistan v. The President of Pakistan, 2007 PLD SC 578

⁸⁰ Amnesty International report ,Pakistan: Fatal erosion of human rights safeguards under emergency, 2017

⁸¹ Saba Naveed Shaikh, Emergency and security laws Pakistan, 2011

⁸² Federation of Pakistan v. General (R) Pervez Musharraf, 2019

⁸³ Ghias, Shoaib A. "Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf." *Law & Social Inquiry* 35, no. 4 (2010): 985-1022.

of Emergency situations in Pakistan can draw a conclusion that the proclaimed emergencies are misused and are not well planned.

(C) Emergency proclaimed in India

In India numerous numbers of emergencies were declared during the regime of Indira Gandhi and by the Janata Party post emergency. Out these emergencies the most controversial emergencies were proclaimed during the rule of the congress party which was on the basis of war, internal disturbance or external aggression. The first emergency was declared on October 1962 on the grounds of article 352 when the prime minister was Jawaharlal Nehru when there was a sudden attack on India by China, the emergency was lifted on 1968.⁸⁴ The government also invoked article 359 which suspended all fundamental rights including the right to life.⁸⁵ The government used this situation for the arrest of hundreds of persons who worked against the national interest. The government was reluctant to uplift the emergency even after the signing of Tashkent agreement which normalized the war between Pakistan and India and the situation was under control.⁸⁶ The emergency was proclaimed on 1971 December when Indira Gandhi was the Prime Minister, the emergency was proclaimed on grounds of armed conflict with Pakistan.⁸⁷ The Indira Gandhi government enacted several acts like Coffee POSA, MISA which enabled the government to detain the people acting against will of government which resulted into a lot of unchecked deaths and encounters⁸⁸. Even before the need for emergency was over it was not lifted and in addition to that another emergency was declared on 1975 on the grounds of internal disturbance. This emergency was the first one where a President declared emergency without discussing with the houses and only on the sayings of the Prime Minister.

1. Political Policing

The police cruelty was also on a rise and government took no action since the police was acting on the interest of the government. A lot of unchecked custodial deaths and arrests were made. The police were instructed by the district commissioner who was controlled by the chief minister, who was ordered by Indira Gandhi, this was the chain of command during emergency period.⁸⁹ People were jailed and made to sufferer regales of their health or age. People saw

⁸⁴Sidharth Chauhan, Representatives of the Indian Emergency in Popular Fiction, 5 Socio-Legal Rev. 40 (2009).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Kuldip Nayar, *The Judgement: Inside Story of Emergency in India*(New Delhi: Vikas Publishing House, 1977)

police with a sense of fear and horror rather than feeling a sense of protection⁹⁰. Newspapers reported incidents of open fire and lathi chargers against innocents. Government used the force to detain the opposition members and people who disobey the government. The liberties and civil rights of person detained shall not be curbed due to the process of detention⁹¹.

V. ANALYSIS OF THE EMERGENCIES PROVISIONS OF INDIA, PAKISTAN AND WEIMAR

If an analysis of the all three constitutions is drawn it could be understood that there are several things which are similar and different the constitutions. The constitutions of India and Pakistan are almost similar to each other in terms of provisions of emergency. Both these constitutions derive the suspension of Fundamental rights during emergency from the constitution of Weimar. In all three constitutions the imposition of fundamental rights will go against the concepts of federalism since the President or the central shall have the supreme power, democracy, the citizens shall not have power to speak up against the actions of the government. Even the judiciary cannot interfere in the matters of the government and the media cannot present any content which goes against the government. As per the emergency provision in the Weimar constitution if the state is not functioning as per the statute or constitution the president after informing the Reichstag shall for the safety of the public take any necessary steps with the aid from the armed forces of the country with the aim of restoring peace⁹². The president for this purpose can suspend the fundamental rights⁹³ with on a temporary basis till the emergency is revoked⁹⁴. The procedure for revocation is that the President of the Germany should be satisfied that the aim is achieved. The constitution of India and Pakistan also revolves around this core idea of Weimar. As per the Indian and Pakistan constitution, for the proclamation of emergency there should be a war, external aggression or internal disturbance or armed rebellion. Both the countries have the emergency inherited from the Government of India act, 1935. Pakistan and India have a common past and have both achieved independence by the same Act, from the British Colonial Rule-the Indian Independence Act 1947. The two countries share succession and legacy. In the researcher's opinion an analysis of the controversial emergencies declared in all three countries, it could be understood that the one declared in Germany was the worst which might be due to various reasons including the vague explanation of article 48 of the constitution. The emergency declared in India and Pakistan was

⁹⁰ *Id.*

⁹¹ *State of Maharashtra v. Prabhakar Pandurang Sangzgiri and Anr* (1966) 1 S.C.R. 702

⁹² Constitution of Weimar, 1919 art. 48

⁹³ Constitution of Weimar 1919, arts 153, 124, 123, 118, 117, 115 and 114.

⁹⁴ *Id.*

a method of complete utilization of emergency powers. But the judiciary had no say in emergency declared in India but there was judicial interference post emergency in Pakistan. However in the *Minerva Mills* case⁹⁵ the court held that the court could review the case if there is an issue of constitutional determination but cannot consider the appropriateness of situations and facts on which the emergency was proclaimed. According to the case of *Mohan Chowdary*⁹⁶ person shall have no locus standi for enforcement of the fundamental rights which are stated in the presidential order. Challenge to Executive actions either on the ground that these are arbitrary or unlawful has been negative in several cases⁹⁷, the reason is that during the times of emergency the executive safeguards a person.

VI. CONCLUSION & SUGGESTIONS

India and Pakistan claim to be a federal country but to the contrary both the countries by imposing emergency provisions watered down the factors of federalism for the goal of centralised co-ordination. Further analysis of all proclaimed emergency in the countries makes it evident that in most of case the government has used them for their personal gains and to increase the power of centre. Hence the confidence in these provisions could not be restored by transplanting a borrowed system rather it should be formed with people's rationale. The emergency provisions in Pakistan and India should be amended in a way the true goal of the provisions is achieved and not mere centralization of power. It is necessary to amend the emergency provisions of the countries in order to avoid chaos and misuse of power in the future generations.

⁹⁵ *Minerva Mills v. UOI* (AIR 1980 SC 1789)

⁹⁶ (1964) 4 SCR 797

⁹⁷ *Sree Mohan Chowdhury v. the Chief Commissioner, Union Territory of Tripura* (1964) 3 S.C.R. 442
Greene v. Secretary of State for Home Affairs 1942 A.C. 284