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Position of Fundamental Rights During Emergency in India: An Analysis

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ABSTRACT

The Constitution of India guarantees fundamental rights to the people in India. Even though the fundamental rights are not absolute and there are certain restrictions the fundamental rights are enforceable through the Constitutional courts in India. This paper analyses the power of the state to suspend fundamental rights during various emergencies in India.

Keywords: *Fundamental Rights, Emergency, Suspension of Fundamental Rights.*

I. INTRODUCTION

Fundamental rights are enshrined in the part III of the Indian constitution. They are part of those rights which are necessary for the survival of a human being with dignity. The rights reflect a desire of the founding fathers of Indian constitution to build a new social order. The rights are not absolute but subject to certain reasonable restrictions. The fundamental rights can be suspended during the declaration of emergency in the country.

II. EMERGENCY PROVISIONS UNDER THE INDIAN CONSTITUTION

Part XVIII of the constitution permits the state to suspend various civil liberties and the application of certain federal principles during presidential proclaimed states of emergency. The constitution provides for three categories of emergencies: a threat by "war or external aggression" or by "armed rebellion"; a "failure of constitutional machinery" in the country or in a state; and a threat to the financial security or credit of the nation or a part of it. Under the first two categories, the Fundamental Rights, with the exception of protection of life and personal liberty, may be suspended, and federal principles may be rendered inoperative.

(A) National Emergency

National emergency is caused by war, external aggression or armed rebellion in the whole of India or a part of its territory. Such an emergency was declared in India in 1962 (Indo-China war), 1965 (Indo-Pakistan war), 1971 and 1975 (declared by Indira Gandhi to maintain law and order in the country). The President can declare such an emergency only on the basis of a written request by the Council of Ministers headed by the Prime Minister. Such a proclamation

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must be approved by the Parliament within one month. Such an emergency can be imposed for six months. It can be extended by six months by repeated parliamentary approval. In such an emergency, Fundamental Rights of Indian citizens can be suspended. The six freedoms under Right to Freedom are automatically suspended. However, the Right to Life and Personal Liberty cannot be suspended. It modifies the federal system of government to a unitary one. The Parliament can make laws on the 66 subjects of the State List (which contains subjects on which the state governments can make laws). Also, all money bills are referred to the Parliament for its approval. The term of the Lok Sabha can be extended by a period of one year but not more than six months from the date when the emergency has ceased to exist.

a. *Effect of national emergency on the fundamental right*

In *Makhan Singh V. State of Punjab*² Emergency was declared on an earlier occasion during the Indo-China war. At that time the right to move any court for the enforcement of Articles 14, 21 and 22 was suspended under Article 359 only for the persons detained under the Defense of India Rules (DIR), the Preventive detention law at that time. It was a partial suspension. Supreme Court interpreted it to mean that rights were suspended only for legally detained persons. So if a person was illegally detained under DIR, he could maintain the Habeas Corpus petition. It was for the first time during emergency imposed on 26th June 1975 that Articles 14, 19, 21 and 22 were suspended in their entirety, without any reference to any law. This time when detenués filed Habeas Corpus petitions, a question was raised that Article 21 being the sole repository of liberty has been suspended in its totality, no writ of Habeas Corpus is maintainable. The Government also sought to distinguish the earlier case of Makhan Singh on the different phraseology of the notification suspending the rights. Almost all the High Court's decided this question against the Government. And on this issue the matter was taken in appeal to the Supreme Court. The Supreme Court held that it was impossible to accept that only right that can be suspended by an order made under article 359(1) was the right guaranteed by article 32 (1) to move to the Supreme Court for the enforcement of the fundamental rights and a citizen would be free to seek relief from high court under Article.226, Article 32 (3) which enable parliament to empower any other court to exercise all or any of the power exercisable by the Supreme Court. The Supreme Court pointing out that a citizen would not be deprived of his right to move the appropriate court for a writ of habeas corpus if his detention had been malafide.

² AIR 1964 SC 72.

In another case *Maharashtra state v. Prabhakar*³, the Supreme Court held that if a person was deprived his personal liberty not under the Defence of India act, or any rule made there under but the contravention thereof, his right to move the said court in that regard would not be suspended.

In *Ram Manohar Lohia v. State of Bihar*⁴, the Supreme Court held that the order of the president did not form a bar to all applications for release from the detention under the act or rule. Where a person was detained in violation of the mandatory provision of the Defence of India act his right to move the court was not suspended.

In *Mohd. Yaqub v. State of Jammu and Kashmir*⁵, the Supreme Court held that an order by the president under article 359(1) was not law within the meaning of article 13(2) and therefore its validity cannot be challenged with reference to the provision of part III. Thus if the order suspends the enforcement of article 14, it cannot be challenged on the ground that it is discriminatory under article 14. The validity of the order cannot be tested under the very fundamental rights, i.e. article 14, which it is suspended. Here the Supreme Court overruled its own decision in *Ghulam Sarwar v. Union of India*⁶, wherein it had held that the presidential order issued under article 359 (1) could not be challenged as being discriminatory.

In the case of *ADM Jabalpur v. Shiv Kant Shukla*⁷, Article 21 of the Constitution guarantees right to the life and liberty. Right to move to the court to enforce Article 21 was suspended under Article 359 of the Constitution during internal emergency (1975-77). In this case the Presidential Order referred to was the one issued during Emergency declaring that the right of any person to move any Court for any enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution and all proceedings pending in any Court for the enforcement of the above mentioned rights shall remain suspended for the period during which the Proclamation of Emergency are in force. Marking the black day of Indian legal history, the Supreme Court rejected the arguments of the Respondents and held that Article 21 of the Constitution was the sole repository of right to life and liberty and therefore, the suspension of it implied that all the remedies protecting this right under any other law shall also be suspended. The Court while construing Article 21 as the sole repository of life and personal liberty denied all available remedies to the detunees on any ground that any challenge to the detention order for the enforcement of the right to personal liberty under Article 21 could not

³ AIR 1996 (3) SCC 463.

⁴ AIR 1996 SC 740.

⁵ AIR 1992 (4) SCC 167.

⁶ AIR 1967 SC1335.

⁷ AIR 1976 SC 1207

be so done on account of the presidential order suspending it being in force. The majority further held that even the order of detention could not be challenged even on any other ground, even if the detention order was passed malafide, rendering the detenu without any remedy even against an illegal detention. Therefore, the Court declared, “in view of the Presidential Order dated June 27th, 1975 no person has any locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations”, closing its doors to any sort of relief whatsoever to any person suffering from illegal detention.

After 44th constitutional amendment Article 21 of the Constitution; right to life and liberty, now cannot be suspended. Not even during emergency, 44th Constitutional Amendment Act, passed unanimously, ensured it. It is instructive to look back on the Habeas Corpus case during internal emergency (1975-77), the reason for 44th Constitutional Amendment Act.

b. *The 44th Amendment act, 1978*

It has made two important changes in article 358: first, Article 19 will suspend only when a proclamation of emergency is declared on the ground of war or external aggression and not when the emergency declared on the ground of armed rebellion. Secondly: it has inserted a new clause (2) in article 358 which says that nothing in clause (1) shall apply to- (a) any law which does not contain a recital to the effect that such a law is in relation to the proclamation of emergency, or (b) to any executive action taken otherwise than under a law containing such a recital. This clause makes it clear that art. 358 will only protect emergency laws from being challenged in court of law and no other laws which are not related to the emergency. Prior to this, the validity of even other laws, which were not related to emergency, could not be challenged under article 358. The 59th amendment has amended art. 358 and has inserted the word “or by armed rebellion, or that the integrity of India is threatened by internal disturbance in the whole or any part of the territory of Punjab” after the words “or by external aggression”. This means that, in case of Punjab, the right guaranteed by the art. 19 will be suspended also when emergency is declared on the ground of “armed rebellion or internal disturbance.”

The proclamation of emergency, however, does not invalidate a law which was valid before the proclamation of emergency. In *M. M. Pathak v. Union of India*⁸, the Supreme Court had an occasion to consider the effect of the expression “the thing done or omitted to be done” in

⁸ AIR1978 3 SCR 334

article 358 after proclamation of emergency ceases. In that case a settlement was arrived at between the LIC of India and its employee in 1977 under which the LIC had agreed to pay in cash bonus to its employee. In 1977, however by the LIC (modification of settlement) act, 1976 passed by the parliament during emergency the settlement was made ineffective and therefore the employee could not demand their bonus while the emergency was in force. The employee of the LIC challenged the constitutional validity of the above act. The Supreme Court held that the effect of proclamation of emergency on fundamental right guaranteed by article 14 and 19 are not suspended during emergency but their operation will be suspended. This means that only the validity of an act based on article 14 and 19 is suspended during emergency. But once this embargo is lifted, article 14 and 19 of the constitution, whose use was suspended, would strike down any legislation which would have been invalid. In other words, that the declaration of validity is stayed during emergency. The expression “the things done or omitted to be done” occurring in article 358 does not mean the right conferred is washed off completely. The expression is interpreted very narrowly. Therefore, as soon as the emergency is over, the settlement would revive and what could not be demanded during the period of the emergency would become payable even for the period of emergency for which payment was suspended. In other words the enactment will have effect even after the emergency had ceased. The valid claims cannot be washed off by the emergency per se. They can only be suspended by a law passed during the operation of article 358 and article 359 (1). Suspension of fundamental rights, however even during a period of national emergency is an utterly undemocratic practice whatever may be the case in its favour. Its immediate result is that a sanctuary of human rights which has been a prohibited area for the executive is thrown open for its unrestricted action. In the process, individual liberty is bound to suffer. For, where the executive is at liberty to act with impunity, abuse of power becomes its natural concomitant. Hence, there is great need for parliament to be extra vigilant and create, if necessary, a suitable machinery which could review every case of curtailment of the individual freedom. If emergency is used as a cover for political gain or vindictiveness by the parity in power, it will amount to a fraud on the constitution. In contrast of the demands of national emergency declared under article 352, fundamental rights were never suspended during any of the emergencies proclaimed in the states. That remains a good precedent. Even during a national emergency, suspension of fundamental rights should be restricted to the absolute minimum. The apprehension that the president may act emergency provisions has been on the whole justified when viewed from the experience of the past.

(B) State Emergency (Article 356)

Article 356 of Indian constitution define state emergency. The essence of the Article is that upon the breach of certain defined state of affairs, as ascertained and reported by the Governor of the State concerned (or otherwise), the President concludes that the 'constitutional machinery' in the State has failed. Thereupon the President makes a 'Proclamation of Emergency,' dismissing the State Legislature and Executive. During a state of emergency, the President is vested with tremendous discretionary powers. Any legislation or constitutional provision that abrogates any of the basic principles of democratic freedom is anathema to most people and the more so to the people of the largest democracy in the world. Having just gained independence after a long and continuous struggle, the people of India would naturally have the greatest interest in preserving all the freedoms envisioned in a democratic society. This provision is misused by the political parties in power at the Center to dismiss the governments ruled by opposition parties in the states. This has been a threat to the concept of Federalism in India. Now the Courts have started interfering and have held the actions of the central government (in law issued by the President) as unconstitutional and have revived the legislatures of the states which were dissolved by the proclamation under Article 356.

a. Judicial Review

The susceptibility of a Proclamation under Article 356 to judicial review is beyond dispute, because the power under Article 356(1) is a conditional power. In the exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. So the controversy actually revolves around the scope and reach of judicial review. From the decisions in the case of *State of Rajasthan v. Union of India* and the *Bommai* case, it is clear that there cannot be a uniform rule applicable to all cases it is bound to vary depending upon the subject matter, nature of the right, and other factors. However, where it is possible the existence of satisfaction can always be challenged on the ground that it is 'malafides or based on wholly extraneous and irrelevant grounds.

The relevance of judicial review in matters involving Article 356 is also emphasized in the Supreme Court judgment in the *State of Madhya Pradesh v. Bharat Singh*,⁹ where the Supreme Court held that it was not precluded from striking down a law passed prior to a Proclamation of Emergency, as ultra vires to the Constitution, just because the Proclamation was in force at that time Judicial review of the Proclamation under Article 356(1) was first

⁹ AIR 1964 MP 175

tested in *State of Rajasthan v. Union of India*¹⁰, the state filed suit challenging the validity of the directives issued by the home minister to the chief minister to dissolve their assembly and seek a fresh mandate. The letter disclosed the sole ground for the proclamation under art. 356 and that such a proclamation and dissolution of their legislative assembly upon the grounds given in the letter was outside the scope of art. 356 of the constitution. It was also contended that condition precedent to the dissolution of the assemblies is a ratification by both the houses of parliament and so that no dissolution can take place without ascertaining the wishes of the both the houses of parliament. The petitioners prayed for a permanent injunction restrain the union of India from giving effect to the home minister directive. On behalf of the union of India, it was contended that suit under art. 131 was not maintainable because dispute of a political character regarding the continuance of a council of a minister. A seven member's constitution bench of the Supreme Court by a unanimous judgment rejected the petitioner petition and upheld the center's action of dissolving three assemblies under art. 356 as constitutionally valid.

The Supreme Court, being the ultimate interpreter of the Constitution, has the power of judicial review on all actions emanating from or empowered by any constitutional provision. Though the power of the President under Article 356 concerns his political judgment and the courts usually avoid entering the political thicket, this power does not enjoy blanket immunity from judicial review. It has to be determined in the individual cases on the basis of justifiability, which is distinct from judicial review. But unless the malafides of the Presidential Proclamation is shown, the Courts have been exhorted by the Supreme Court to avoid delving into the President's satisfaction for want of judicially manageable standards. This point is amply evident in the case of *Minerva Mills and Others v. Union of India*¹¹, where the Supreme Court dwelt extensively on its power to examine the validity of a Proclamation of Emergency issued by the President. The Supreme Court in this matter observed, inter alia, that it should not hesitate to perform its constitutional duty merely because it involves considering political issues. At the same time, it should restrict itself to examining whether the constitutional requirements of Article 352 have been observed in the declaration of the Proclamation and it should not go into the sufficiency of the facts and circumstances of the presidential satisfaction in the existence of a situation of emergency. Thus we can safely conclude that, though limited, the Presidential Proclamation under Article 356 is subject to judicial review.

The most recent case which decided the extent of judicial review of the Proclamation by the

¹⁰ AIR 1977 SC 1361

¹¹ AIR 1980 SC 1789

President imposing „President“s Rule“ in the states and consolidated the legal position on the subjective satisfaction of the President is *SR Bommai v Union of India*¹², was a landmark in the history of the Indian Constitution. It was in this case that the Supreme Court boldly marked out the paradigm and limitations within which Article 356 was to function. In the words of Soli Sorabjee, eminent jurist and former Solicitor-General of India, 'After the Supreme Court's judgment in the S. R. Bommai case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed.

(C) Financial Emergency

If the President is satisfied that there is an economic situation in which the financial stability or credit of India is threatened, he or she can declare financial emergency. Such an emergency must be approved by the Parliament within two months. It has never been declared. Such a situation had arisen but was avoided by selling off of the gold assets of India. It remains enforced till the President revokes it. In case of a financial emergency, the President can reduce the salaries of all government officials, including judges of the Supreme Court and the High Court. All money bills passed by the State legislatures are submitted to the President for his approval. He can direct the state to observe certain principles (economy measures) relating to financial matters. The 44th amendment makes Article 360 self-contained. It provides that the proclamation of financial emergency shall cease to be in operation at the expiry of two months unless it has been approved by both houses of parliament. Such a proclamation may be revoked by the president by subsequent proclamation. But if the Lok Sabha is dissolved during the period of two months and resolution is approved by the Rajya Sabha, but not by the Lok Sabha the proclamation shall cease to operate at the expiry of 30 days from the date on which the new Lok Sabha sits unless before the expiry of 30 days a resolution approving proclamation is passed by the Lok Sabha.

The phrase Emergency period used loosely, when referring to the political history of India, often refers to the third and the most controversial of the three occasions.

“The constitution of India is unique in respect that it contains a complete scheme for speedy re-adjustment of the peace time governmental machinery in movement of national peril. These provisions may appear to be particular in a constitution which professes to be built upon an edifice of fundamental rights and democracy. But the provision must be studied in light of India“s past history. India had her in glorious days whenever the central power grew weak. It

¹² AIR 1994 SC 1918

is far well that the constitution guards against the forces of disintegration. Even may take place threatening the very existence of the state and if there safe guard against such eventualities the state together with all that is desired to remain basic and immutable, will swept away.”

III. SUSPENSION OF RIGHT TO ENFORCE FUNDAMENTAL RIGHTS

Article 359 empowers the president to suspend the right to enforce fundamental rights guaranteed by part III of the constitution. It says that while the proclamation of emergency is in operation, the president may by order declare that the right to move to any court for the enforcement of such of the fundamental rights as may be mentioned in the order (except article 20 and 21) 44th amendment, and all proceeding pending in any court for the enforcement of such rights shall remain suspended for the period during the proclamation in force or such shorter period as may be specified in the order. An order suspending the enforcement of fundamental rights may extend to the whole or any part of the territory of India. An order made under clause (1) shall, as soon as possible, be laid before each houses of parliament. The constitution (38th amendment) act 1975, added a new clause (1-A) in art. 359 which provides that while an order under clause (1) is in operation, nothing in part III shall restrict the power of the state to make any law or to take any executive action. Any such law shall cease to have effect to the extent of the incompetence, as soon as the order cease to operate except as respect thing done or omitted to be done before the law so cease to have to effect. The 44th amendment made two significant changes in Art. 359: First, it provides that under Article 359 does not have the power to suspend the enforcement of the fundamental rights guaranteed in Art.20 and 21 of constitution. Secondly it provides that suspension of any fundamental rights under article 359 will not apply in relation to any law which does not contain declaration such a law is in relation to the proclamation of emergency in operation when it is made or to any executive action taken otherwise than under a law containing such retail. Thus law not related to emergency can be challenged in the court of law even during emergency. This amendment was sequel to the decision of the Supreme Court in the habeas corpus case. The amendment is intended to remove the recurrence of such a situation in future. It is to be noted that unlike art.358 under art. 359 the suspension of right to move any court for the enforcement of fundamental rights is not automatic. It can be only be brought about by a presidential order. In September 1962 china attacked India. On 26th October 1962, the president of India issued a proclamation of emergency under article 352(1) declaring that a grave emergency exist whereby the security of India is threatened by „ external aggression“.

On 3rd November 1962 the president issued an order under article 359(1) which ran thus: “In

exercise of the power conferred by clause (1) of article 359 of the constitution, the president hereby declare that the right of any person to move any court for the enforcement of the rights conferring by art. 14,21,and 22 of the constitution shall remained suspended for the period during which the emergency issued under article 352(1) on 26th October, 1962 was in force, if such person has been deprived of any rights under the Defense of the India act, 1962 or any rule order made there under .” But now it is changed after the 44th constitutional amendment.

(A) Effects of Emergency Proclamation on the Fundamental Rights

Federal laws will overrule state legislation, and the Union is empowered to govern areas (e.g. Policing) that are normally devolved to the states. The Union is also empowered to take over and completely control the taxation and budgetary revenue processes. Under financial emergency, the Union is empowered to have the final say in the promulgation of financial acts approved by the state legislature. The Union may decide to suspend some or all of the fundamental rights guaranteed by Part III (Articles 12 through 35) of the constitution - which include:

- Freedom of equality before law
- Freedom of speech and expression
- Freedom to assemble peacefully
- Freedom for movement across Indian territory
- Freedom to practice any profession, occupation, trade or business.
- Freedom to practice or propagate religion.
- Further, the right to challenge the suspension of the above mentioned rights (the right to constitutional remedies) may also be suspended. However, this provision will not cover the suspension of articles 20 and 21 which govern rights to personal liberty, Right to silence, freedom from double jeopardy and freedom from unlawful arrest and detention. Any individual, who deems that his rights under these categories have been suspended unlawfully, can challenge the suspensions under a court of law.
- The Union may decide to dismiss the legislative functions of a state legislature and impose federal law for a period of six months. This state of suspension may be renewed at the end of this period under the vote of Parliament (indefinite number of times) until such a time when the Election Commission of India can certify the feasibility of holding free and fair elections in the state to reconstitute the legislature.

- Any order to the above effects however, should be passed by the House of Parliament "as soon may be after it is made"

IV. ARTICLE 32 AND THE REMEDY OF COMPENSATION IN CASE OF EMERGENCIES

Compensation to victims is a recognized principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is taking decades for the victims to get a decree for damages or compensation through civil courts, which is resulting in so much hardship to them. Article 32(1) provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case. In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in "appropriate cases".

Article 32(3) parliament may empower any other court by law within the local limit of its jurisdiction all or of the power exercisable by the Supreme Court under cl. (2). So as mentioned article 32 (4) that right of the constitutional remedies may be suspended, during certain circumstances. These circumstances are the emergencies as discussed earlier like, during external aggression, internal disturbance and break down of constitutional machinery, by order declared by the President, to move any court for enforcement any fundamental rights shall remain suspended (Art. 359). But in case of enforcement of article 20 and 21 can be enforced during the emergency under article 32.

V. CONCLUSION

Fundamental Rights are those rights which are considered necessary for the development of the personality of an Individual. They are included in the constitution so that every citizen can enjoy them and no one is able to encroach upon them. Only when an emergency is declared, these rights can be suspended by the central government. First thing to be done during emergency is to protect the society from external aggression, or maintain the decorum of the state during internal disturbance. But even the period of emergency, the persons have retained the right to life and personal. No one can deprive from the right to life and personal liberty and it shall be enforceable under article 32.
