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# Position of Fundamental Rights in Emergency

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## ABSTRACT

*There are three types of emergencies stipulated in the Indian constitution and are applied at three different levels- the national level, state level and financial emergency. During a period of crisis, the president of India can announce a state of emergency. It refers to a period of governance under which the fundamental rights guaranteed by the constitution can be overruled by the president on being recommended by the cabinet of ministers. The provisions of Article 359 allow the President of India to suspend the Fundamental rights. Different kinds of freedom guaranteed by the constitution are suspended during the state of emergency however, the right to personal liberty is not suspended. These rights are the means of obtaining justice for the ordinary citizen and can be enforced by the supreme court when approached under Article 32 of the Indian Constitution. This paper tries to assess the subject and scope of those provisions when an emergency is in operation and to evaluate their effect on the democratic republic and personal liberty.*

**Keywords:** *Emergency Provisions, Fundamental Rights, Personal Liberty.*

## I. INTRODUCTION

Fundamental rights are revered in part III of the Constitution of India. They are essential for the individual to live their life with dignity and helps in their survival. Major rights have been joined in the fundamental law of the land. For example, the constitution of India and one can move toward courts in the event of an infringement of these rights. These rights mirror the want of the architects of the Indian constitution to attain social equality among the citizens of this country. Fundamental rights in the constitution have been borrowed from the United States of America. There are six categories of fundamental rights mentioned in the Constitution of India. These are the Right to equality (Art. 14-18); the Right to freedom (Art. 19-22); the Right against exploitation (Art. 23-24); Right to freedom of religion (Art. 25-28).

These rights are not absolute and can be subjected to reasonable restrictions to maintain social order. The Fundamental Rights can be suspended during an emergency by the President of India under Article 359. The six freedoms under the Right to Freedom are automatically suspended. By contrast, the right to life and personal liberty cannot be suspended according to

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the original Constitution. The Fundamental Rights are justiciable. Under Article 32 of the Constitution, a person can go to the Supreme Court for the enforcement of these rights. Part XVIII of the Constitution of India talks about the emergency provisions (Art. 352-360 of the Constitution of India). There are three kinds of emergencies: I. National Emergency (Art. 352) II. State Emergency (Art. 356) III. Financial Emergency (Art. 360). During the time of emergency, the centre has the right to take full legislative and executive control of any state and can also suspend the fundamental rights of the citizen.

## **II. HISTORY OF EMERGENCY PROVISIONS**

Emergency powers, even when applied gradually, lead to destructive repercussions. Even though applying something gradually might not come into the public eye but they are more dangerous than a sudden application of the emergency provisions. The use of emergency powers by the US after the 20<sup>th</sup> century is a prime example of this risk and holds the legislature of the country for the development of emergency powers in the country. Similar to the United States constitution, the Indian constitution drafted between December 1946 to December 1949 laid down the foundation of the emergency provisions. However, the provisions related to the emergency were highly debated and at one point in time were withdrawn for further examination by the Constituent assembly. Nine articles enshrined in part XVIII of the constitution provided the president with the power that he or she may deem necessary with the objective of removing difficulties either by the process of modification, addition or omission can make such adoptions. The inspiration behind this was the clause of suspension of Habeas Corpus in the United States Constitution. Disturbances within the country, aggression from the outside and any difficulties to the financial stability or nation's stability would justify the decision of the president to invoke emergency actions.<sup>2</sup>

Also, at the time of framing the constitution, the situation in the country played an important role in including emergency powers in the Indian constitution. Internal disturbances led by the forces of casteism, regionalism, communalism further disrupted the peace and brotherhood of the country.<sup>3</sup> The establishment of democracy was facing difficulties because of the conflicts between the Hindu and Muslim communities. All of these led to the inclusion of emergency powers in the constitution of India in the form of article 352.<sup>4</sup> Spurt in communist movements at the time of independence led to the formation of article 356 in the Indian Constitution for taking care of the constitutional machinery of the state in case of breakdown. Deteriorating

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<sup>2</sup> CHIRS EDELSON, EMERGENCY PRESIDENTIAL POWER 54-67 (University of Wisconsin Press 2013).

<sup>3</sup> B. C. DAS, *The Indian Journal of Political Science*, 237-252, (1977), <http://www.jstor.org/stable/41854792>.

<sup>4</sup> *Ibid.*

economic conditions and the fall of foreign reserves resulted in the emergence of article 360 of the constitution.

### **III. EMERGENCY PROVISIONS UNDER INDIAN CONSTITUTION**

During the period of emergency, the president under the provisions enshrined in part XVIII of the constitution can order the suspension of some of the civil liberties and also of some of the principles of federalism. Threat to the internal peace by war or any kind of external aggression, breakdown of state machinery and failing security of foreign deposits responsible for degrading economic conditions are three types of emergencies present in the Indian constitution. All fundamental rights and principles of federalism are suspended under the national emergency and state emergency with the only exception being the right to life and personal liberty.

#### **(A) National Emergency (Article 352, 353, 354, 355 and 358)**

Emergency at the national level is caused by external aggression, a war-like situation in the part or whole of a nation. There have been few instances where such national emergency came into play in India like during the India and China war in the year 1962, India and Pakistan war in the year 1965, and also the years 1971 and 1975 for maintaining the law and order. An emergency can only be declared if the council of ministers headed by the prime minister requests the president for the same. The period for the approval of emergency orders is one month and can be applied for six months. The increase in the period of emergency can be done through the same parliamentary approval.

During the period of national emergency, the fundamental rights related to freedom, six of being suspended. The right to life and personal liberty cannot be suspended even during a period of national emergency. The form of government is modified into the unitary one with the centre making the laws relating to all 66 subjects of the state list. The tenure of the Lok Sabha can be increased by 1 year but not more than six months from the date on which the emergency will cease to exist.<sup>5</sup>

#### **(B) State Emergency (Article 356)**

State emergency is defined in Article 356 of the Indian constitution. The objective behind this article is on the report of the governor, the president concludes that certain actions by the state or within the state has led to the failure of constitutional machinery which results in the declaration of emergency thus dismissing the state legislature and executive. President has immense discretionary power during the period of State emergency. Provisions like

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<sup>5</sup> R.K. SINGH, INDIAN POLITY AND CONSTITUTIONAL ISSUES 339 (Arihant Publication Limited 2015).

emergencies hinder the democratic freedoms given to the people of the largest democracy in the world. Such provisions are most likely misused if the parties at the centre and the state are not, the same or not following each other. However, the supreme court has started taking cognizance of the actions of the central government to keep a check on the abusive power.<sup>6</sup>

### **(C) Financial Emergency (Article 360)**

If the president concludes that the stability of the country when it comes to the economic conditions is under threat then he will declare a financial emergency. The period for the approval of an emergency is within two months. A financial emergency is yet to be declared in India. One of such situations where the applicability of financial emergency was inevitable was avoided with the gold assets of the country being sold. A financial emergency is in function till it is revoked by the president. The salaries of the government officials and the Supreme court's and the High court's judges are reduced on the orders of the president of India. President directs the state government when it comes to matter the matter of financial emergency. The period of financial emergency is for two months after which ceases to exist until and unless the extension of the period is approved by both the houses of the parliament. Backed by the 44<sup>th</sup> amendment financial emergency is self-contained. If Rajya Sabha approves the resolution to extend the financial emergency but the Lok Sabha is dissolved for two months, then within 30 days of the formation of new Lok sabha the resolution needs to be approved by the same otherwise it ceases to operate.<sup>7</sup>

## **IV. POSITION OF FUNDAMENTAL RIGHTS DURING EMERGENCY**

Fundamental rights guaranteed by the state is enshrined in Part III of the constitution of India are suspended on the orders of the president as per article 359 of the Constitution of India. The president orders that any proceeding for the enforcement of these fundamental rights will be suspended in any court of law. The order of the suspension of the enforcement of the fundamental rights applies to the whole of the country or part of the country. All or some of the fundamental rights enshrined in part III (Article 12-35) are suspended during the period of emergency. Some of these rights are as follows: -

- Freedom of equality before the law.
- Freedom of speech and expression
- Freedom to assemble peacefully

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<sup>6</sup> HORMASJI MANECKJI SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTRY 45-63 (New Delhi: Tripathi 1983).

<sup>7</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 55 (LexisNexis 2009).

- Freedom for movement across Indian Territory
- Freedom to practice any profession, occupation, trade or business
- Freedom to practice or propagate religion

Right to move to the supreme court guaranteed under Article 32(1) which relates to approach the court concerning enforcement of fundamental rights is also suspended. The right to challenge the suspension of these fundamental rights (Right to constitutional remedies) is also not in function during the period of emergency. Articles 20 and 21 are not covered under these suspensions which are related to the Rights to personal liberty, right to silence, Freedom from double jeopardy and right against illegal arrest and detention. Any person whose above rights are infringed in any circumstances can challenge these suspensions in a court of law.

With the 44<sup>th</sup> amendment, two of the most important changes were made in Article 359. Firstly, no suspension of enforcement of fundamental rights mentioned in Articles 20 and 21 of the Indian constitution. The second change that was brought up by the amendment was that law not specifically related to the emergency can be challenged in the court of law. 44<sup>th</sup> amendment came into existence after the habeas corpus case. However, one must know that the order for the suspension of the fundamental rights is not automatic and can only be brought by an order.

#### **(A) Landmark cases**

In the case of **Makhan Singh vs the State of Punjab**<sup>8</sup>, it was held by the Supreme court that only the person who has been legally detained cannot approach the court for the enforcement of fundamental rights. If the detention of the individual is not following the law, then he has every right to approach the court for the enforcement of his fundamental rights. Supreme court also held that the person who has been illegally detained can approach either the Supreme court or High court whatever is deemed accessible and necessary since under Article 32(3) supreme court has the power to provide the high court with all the powers and functions of the supreme court. This was also known as the Habeas corpus case since it was held that one's Habeas Corpus petition cannot be rejected if the detention of the individual is not per the law.

In the case of **Ram Manohar Lohia vs the State of Bihar**,<sup>9</sup> if the person is detained by following specific provisions of the defence of India act, there can be no suspension of his right to move to the court. The decision of the Supreme court in the case of Mohd. Yaquub VS State of Jammu and Kashmir<sup>10</sup> overruled its decision given in the case of Ghulam Sarwar VS Union

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<sup>8</sup> Makhan Singh V. State of Punjab, AIR 1964 SC 72, 83.

<sup>9</sup> Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740.

<sup>10</sup> Mohd. Yaquub v. State of Jammu and Kashmir, AIR (1992) 4 SCC 167.

of India<sup>11</sup>, where it was decided that the order of the president cannot be challenged on the ground of it being discriminatory.

The most important cause of them all is the case of **ADM Jabalpur VS Shiv Kant Shukla**<sup>12</sup>. During the period of emergency in the year 1975-77, article 21 of the Indian constitution which guarantees the right to life and personal liberty was suspended. A Presidential order during the emergency which ordered the suspension of rights enshrined in the Article 14,21 and 22 and all the proceedings related to the above right was referred to.

The Supreme court marked the day as the black day in the legal history of India. The supreme court held that the right guaranteed under these provisions are the only one providing the citizen with the right of life and personal liberty, suspension of which will lead to the suspension of all the remedies available for this particular right in any other existing laws. The supreme court held that the suspension of the right to life and personal liberty by the presidential order denied the detenus with any remedies available. Also, one cannot challenge the orders even if the detention made is not per the law or with malice. One cannot move forward in any of the courts of law with the petition of Habeas Corpus provided under Article 226. Hence the following judgement was given by the Supreme Court.

With the changes brought upon in the form of the 44<sup>th</sup> amendment act; suspension of the rights guaranteed under Article 21 of the Indian Constitution is not possible not even if the emergency is declared. This amendment passed by the parliament unanimously ensured that no individual should be deprived of the basic right of life and personal liberty. This case during the emergency period along with the case of *Leversidge VS Anderson*<sup>13</sup> which played an important role in the passing of the 44<sup>th</sup> amendment act, also setting up a precedent that can be utilized by the Supreme court in future.

## V. CONCLUSION

When it comes to fundamental rights enshrined in the Indian constitution and its relationship with the emergency provisions have been somewhat unstable, irregular and vague. The cases of Habeas Corpus to the cases of *Makhan Singh* are the prime examples of what can go wrong with the provisos guaranteeing Fundamental rights during the period of emergency. With no courts having the power to deal with the cases related to the emergency has somewhat led to the abusive use of the power by the Government.

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<sup>11</sup> Ghulam Sarwar Vs. Union of India and Ors. AIR 1967 SC 1335.

<sup>12</sup> ADM Jabalpur v. Shiv Kant Shukla, AIR 1976 SC 1207.

<sup>13</sup> *Leversidge v. Anderson*, UKHL 1, AC 206.

Fundamental rights are the basic human rights important for the survival of the individual as well as the development of its personality. The reason behind their inclusion in the constitution of India was to provide the citizen of India a written guarantee of these rights. But their suspension during the period of emergency is a hurdle to the very idea of the founding fathers to establish social values. One can move to the court for the enforcement of these fundamental rights but if and when the emergency is imposed these rights are also suspended. The reason behind the above suspension is the government in order to maintain peace and security of the nation can allow reasonable restrictions on these rights.

The provisos of the emergency were included for the maintenance of peace and security of the country, however, in recent times the provisions have been misused as a way of gaining political control. These cases of the misuse of the emergency powers by the state have led to the emergence of the 44<sup>th</sup> amendment which made sure that any kind of violation of fundamental rights or human rights does not take place during the period of emergency by allowing the individual to approach the court. The principal objective of the emergency is the protection of the state from any kind of external aggression but even in such a situation guaranteeing the rights to life and personal liberty has upheld the soul of the constitution. Also, in recent times the government cannot deny presenting a valid reason behind the imposition of emergency and restriction it has laid down on the fundamental rights guaranteed by the constitution enough for the court to figure out some discrepancies if there are any.

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