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The legitimacy of Emergencies under Article 352 and Grounds for Proclamation in India

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ABSTRACT

The three emergencies carried out under the powers provided in A. 352 were constitutionally valid. Due to the loosely drafted phase of 'internal disturbances' in the article, politicians have been able to exploit and abuse the integrity of their service, office, and tenure. After the dismissal of the emergency, speculation about its validity and safeguards were provided for by the Legislature and Judiciary. But the Legislature failed to take any actions against the abusers owing to its function; Judiciary could not take any action due to the absence of a competent court. Grounds of Proclamations have undergone amendments after 1978 and have provided for more safeguards. Courts have enhanced their position by providing for judicial intervention wherever possible.

I. INTRODUCTION

Three emergencies were declared under Article 352 of the Constitution, each being valid. This paper will analyse the controversy surrounding all cases and situations. Further, legislative effect and judicial comment have been analysed to understand the power of the Legislature and Judiciary.

Emergencies

A national emergency may be defined as a state of emergency when a nation faces a risk or threat of harm from external or internal causes and is generally declared by governmental authorities. Article 352 of the Indian constitution provides the president with the power to proclamation of such an emergency corresponds to statutory procedures that must be followed when an exceptional event threatens or affects the nation's harmony, defence, prosperity, or administration.

Part 18 of the Constitution provides three 'extraordinary situations' to declare 'national security emergencies. These include: (1) National security emergency owing to military conflict or

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armed rebellion, (2) Failure of state machinery and (3) Financial emergency. There have been several improvements in the procedure to proclaim emergencies through judicial intervention after a series of abuse undertaken by politicians. The above expert of the article is modified from the Indian Constitution's original text through the 44th Amendment Act by its enactment in 1978. Articles 356 and 360 provide for the failure of constitutional machinery in States. There have been variances in the interpretation of Articles 352 and 356.

As mentioned in Article 352 of the Constitution, the President must be satisfied that a severe emergency exists in which the security of India is threatened by the following:

- When the nation is in a state of War,
- When there is External aggression; or
- When there is Internal rebellion.

II. BEFORE THE 44TH CONSTITUTIONAL AMENDMENT

Before the amendment, a proclamation of emergency could remain in effect for a duration of 2 months. Moreover, this duration could be extended indefinitely with the assent of the parliament. An emergency could be proclaimed or declared due to wars, extrinsic aggressions, or internal disturbance. However, the phrase 'internal disturbance had a very wide and speculative interpretation.

III. 44TH CONSTITUTIONAL AMENDMENT AND ITS EFFECT

The amendment substituted the expressions 'internal disturbance' with 'armed rebellion to be outside the possibility of an emergency to proclaim the circumstances of 'internal disturbance' that would not involve rebellion with arms as it took place in 1975. It restricted the scope of situations that could fall under the term 'internal emergency.

As per the new framework, the President can only declare an emergency if the Prime Minister and their Cabinet declare the crisis in writing and deliver it to the President. A proclamation should be put forth before every house of parliament and must be accepted until one month from its pronouncement, or else it would lapse. The declaration must be approved by a majority of the entire electorate of each house of Parliament, as well as a majority of not less than two-thirds of the members present and voting. If the condition improves, the President can lift the emergency declaration by issuing a fresh proclamation. After six months, the approval of the declaration of emergency will be reconsidered by 10 or more members of the Lower House. The emergency will be lifted if a clear majority passes the bill at the particularly called meeting.

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IV. PAST EMERGENCIES

The first emergency was declared during the War with China in 1962. Then-president Sarvepalli Radhakrishnan declared that the grounds for the proclamation of this emergency were “India's sovereignty has been deemed "endangered by the external attack”, and it lasted for six years, from October 1962 to January 1968. The conflict with China ended on October 21, 1962, but a new war with Pakistan began just after. After international pressure, the Tashkent agreement was reached, and the then-government withdrew the emergency in January.

The declaration of emergency was largely regarded as having sufficient reasons. The President suspended fundamental rights under Article 19, and Parliament approved the "Defence of India Act, 1962," which limited the courts’ access to some fundamental rights. Preventative detention, defence planning, control of guns and explosives, administration of news and information, requisitioning and purchasing property, and supervision of industrial relations were all areas where the Act's rules "conferred extensive powers on both the federal and state governments." Even though no domestic newspaper was prohibited during the emergency, the government set up a Central Press Advisory Committee to "inform the administration of detrimental material." The customary freedoms of expression, assembly and association were largely unaffected by the state of emergency. In Makhan Singh Tarsikka v. the State of Punjab, 1964, the Supreme Court held that a Presidential Order under Article 359(l) had the effect of imposing "a type of moratorium or blanket prohibition" on the commencement or continuation of any judicial action that "in substance attempted to enforce a Fundamental Right mentioned in the Presidential Order." The Supreme Court unanimously" ruled, based on this reading of Article 359, that a Presidential Order could never serve as a block to proceedings in which executive conduct is challenged on the grounds unrelated to the stated Fundamental Rights. Justice Gajendragadktar, representing the views of six of the seven justices on the Bench, highlighted many pleas that the Presidential Decree did not prohibit. These issues included the enforcement of rights other than those outlined in the Presidential Order, the detention authority's breach of obligatory detention law Requirements, and mala fides.

While the proclamation was largely supported at the time, and civil liberties were not severely curtailed, the most objectionable element of the 1962 emergency was that it lasted considerably longer than was required to resume normal public administration. Although the Chinese incursion ended nearly as quickly as it began, and a formal cease-fire was proclaimed on November 21, 1962, the state of emergency and its restriction of fundamental rights remained in place. Despite requests for the proclamation to be revoked, Prime Minister declared in April

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1963 that "the emergency would endure a long time, whether there was real combat or not." The executive's power to make this choice appeared to be supported by the Supreme Court. It affirmed the President's decree, issued in 1964, prohibiting access to the courts to enforce fundamental rights during a state of emergency. Over the next few years, the Supreme Court dropped out of the argument over emergency powers. It was determined that the judiciary could not stop a proclamation of emergency and that determining whether a true emergency existed is "a political, not judicial matter." The court did not hold back in expressing its concern with emergency powers and the potential for abuse if they were used indefinitely, but it could not put forth statutory logic to end their use. After war broke out on the India-Pakistan border in April 1965, calls for an end to the 1962 emergency were momentarily muted, but when the conflicts ended, criticism of the emergency resumed. Finally, the Home Minister declared in February 1966 that, while the government could not lift the emergency, it would only use emergency powers in the future if national security was endangered.

Prime Minister Indira Gandhi declared the second emergency of India on 3 December 1971, citing ‘external aggression. The Islamic Republic of Pakistan had attacked India, and the Bangladesh Liberation war was occurring.

Proclamation of the third emergency was made on 25 June 1975, citing ‘internal disturbances. It was put forth that some people were involved in inciting the police and armed forces to discharge their duties and functioning in 1975. The emergency was declared on the grounds of ‘internal disturbances’ without any adequate justification for the same; it emergency was issued to keep an unpopular government in office.

Both the second and third emergency were revoked in March 1977

There was a power struggle between the Supreme Court of India and the Parliament when these emergencies were declared. During the emergency of 1975, as many as 16 Judges of the High Court were transferred from one High Court to another. It was largely speculated that the government was pursuing such actions as punitive measures to punish the Judges that dared to give judgements against them.

The motive of the government that led to declaring emergencies could be established at that moment with an effective investigation. However, through judgements and observations, we can account for the situations and contentions facing the Legislature and Judiciary.

Justice Shah Committee was appointed to investigate the circumstances that would warrant the emergency proclamation in 1975.

In the ADM Jabalpur case, the court held that there was no right to life and personal liberty

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beyond the scope of A. 21, and the suspension of Fundamental Rights under Part III of the Constitution was constitutionally valid. However, the case has been overturned by K.S. Puttaswamy v. UOI, which held that infringement over one's life and personal liberty without the authority of law cannot be contemplated in a civilised state. The court further held that life and liberty are not conferred by the state or created by the constitution; instead, they existed before the advent of the constitution and that the constitution is not the sole repository of such rights.

V. PROCEDURE OF PROCLAMATION OF EMERGENCY

Proclamation of emergencies is a very sensitive matter as it is bound to disturb the Constitution's entirety and affect the people's rights. Therefore, proclamations should only be issued in unusual and unavoidable circumstances and not merely to keep governments in office like in June 1975.

A Declaration of emergency is put up before both the Houses of Parliament and it would not remain in force until more than a month unless such a declaration is approved by both the Houses before the expiry of that period.

Invocation of President rule in a state under Article 356 due to the breakdown of constitutional machinery requires that the Governor should act at his discretion in making a report to the President.

A fairly simplistic manner to counter and cope with unusual circumstances that temporarily acquire national importance is provided under Article 249. The article also provides its effectivity when speed is heavily required, and it is not necessary or expedient to invoke the sssssssssssssssssss under Articles 353 and 356.

Article 356 provides provisions for the failure of constitutional machinery of a State, duration of proclamation [356(4)], and laying the same before each house of the parliament [356(3)] and legislative power, exercise, revocation, variation, etc.[356(2)]

The President is entrusted with the power to declare an emergency under article 352, a failure of constitutional machinery of States under Article 356, and a financial emergency under Article 360.

The case of Rajasthan v. UOI provided that Article 74(2) takes away the court's power to inquire about the 'occurrence' or matter or 'contents or nature of the ministerial advice. However, clause (5) of Article 356 allows courts to question the satisfaction of the President. The court held that a president's proclamation could be challenged if the powers exercised were on mala fide, legally and constitutionally prohibited grounds, or for collateral or extraneous purposes.

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Justice Bhagwati held that the President's satisfaction is subjective under Article 356 and cannot be tested by objective tests or by judicially discoverable and manageable standards. Justice Bhagwati also said that the court could not go into the question of "correctness or adequacy" of circumstances on which the Central Government has based its satisfaction, but, moreover, the possibility of State Governments losing the confidence of people could not be ruled out in the case and to continue such governments in the office is wholly undemocratic in its character. However, the court held that the test of satisfaction would be based on the reasonable man test, which would entail that a reasonable person shall reach a conclusion reached by the president based on the facts provided to the president.

The case of S.R. Bommai v UOI decided the constitutionally and legitimate validity of the proclamation made by the President in April 1989. After the defection of some members from the party, majority support in the House was unclear. Even though the Chief Minister proposed that the Governor test the strength of the assembly, the Governor did not act on the proposed directive. The Governor did not think about the chances of formation of an alternative government but instead reported to the President that Bommai had lost the support of a majority in the Assembly, and there was no other party that could form the government and that action under Article 356(1) was required. The court held that the advice of the Council of Ministers forms the basis of the president's powers under A. 356(1), and the power belonged to them. The court held that a Chief Minister's loss of a majority is subject to a floor test. The grounds on which a proclamation was valid under Article 356(1) were whether the issuance was based on any material, whether the material was relevant, whether its issuance was a mala fide exercise of power, or whether it was based on unrelated or irrelevant grounds.

Further, the court held that President could decide whether the government can carry forward based on material provided that may be shown to exist, and the 'satisfaction' of the president would not be available for questioning. The 'satisfaction' should be formed from relevant material. The court held that to challenge the validity of a proclamation; the Government has to prove that it existed. The court further held that if the proclamation were not approved by the both Houses of Parliament within two months, it would lapse. The court held that dissolution of Assembly before taking approval of proclamation of Parliament as per A. 356(3) would be invalid. After the approval of Parliament, the State Assembly can be dissolved but should be suspended during the decision process. The court held that the court could terminate a proclamation invalid even after Parliament's approval. After which, the actions pursued by the President can also be termed invalid. In such circumstances, actions of dismissal and restoration can be reversed. Further, the dismissal of a State Assembly that the Central Government duly

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elected would be against the federalism concepts. The court said that the power of A. 356(1) was to be exercised 'sparingly, scrupulously and with circumspection' since abuse of such power could infringe the federal character and balance.

VI. CONCLUSION

The validity of emergencies cannotanalysedyzed with the out uncooperative participation of the Legislature and Executive. The three emergencies declared are deemed legal in nature, owing to the loose wording of provisions. Abuse of office by Prime Minister Indira Gandhi has been held not to constitute abuse of her powers. After the dismissal of eeeeeeeeeeee es, the legislature cannot term emergencies as legitimate or illegitimate; the Judiciary can do that and further hold persons holding political and public offices accountable. Cases like ADM Jabalpur, Bommai, Rajasthan, etc., provide a greater understanding of where judicial intervention is possible and where there is the possibility of no intervention due to a clear-cut separation of powers. After the 44th amendment, the accountability of proclaiming emergencies has increased relatively.

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