pISSN: 2454-7107, eISSN: 2455-4189

Indian Journal of Law and Human Behavior
Volume 10 Number 2 / July - December 2024
DOI: http://dx.doi.org/10.21088/ijlhb.2454.7107.10224.8

Review Article

History and Development of Concept of Emergency Provisions in India

Sumeet Pal Singh Brar

How to cite this article:

Sumeet Pal Singh Brar, History and Development of Concept of Emergency Provisions in India. Indian J Law Hum Behav 2024;10(2):128-134.

Abstract

Emergency provisions are a set of provisions in the Indian Constitution that are designed to protect the nation's integrity and its people during times of emergency. Emergency provisions are an essential part of the Constitution of India. The Constitution of India is a living document that is designed to protect the country and its people in times of emergency. These emergency provisions are a proof that the founders of the Constitution were well aware of the need for emergency powers in the event of an emergency.This is why it could be perfect to say that Part XVIII is an innovation in Indian Constitution.

Keywords: Emergency provisions, Constitution of India, Extraordinary powers.

INTRODUCTION

Almost all constitutions are designed to cope with uncertain times and events, therefore, emergency provisions are highly important. In constitutional terms, an emergency is a situation which includes 'some imminent danger to the life of the nation, requiring some immediate action' by the government to preserve the prevailing constitutional order.[1]

It is necessary rather inevitable, that the government should be equipped with essential safeguards to protect itself during crisis situations. Therefore confirming of the Government with extraordinary powers to meet the crisis becomes essential.[2] The principle of necessity was well recognized even in ancient India. The great Hindu Jurist of ancient times Manu-the law giver, recognize "Appad Dharma" as one of the Supreme duties or Dharma of a king as protector of his subjects against disorder and anarchy.[3] Emergency as crisis of government is an old concept, many incidences are found in the politico developmental history of India.[4]

Emergency provisions were made in the Constitution to safeguard and protect the security, integrity and stability of the country and effective functioning of State Governments.[5] Emergency is a unique feature of Indian Constitution that allows the center to assume wide powers so as to handle special situations.[6] Emergency Provisions are contained in Part Eighteen of the Constitution of India.[7] The President of India has the power to impose emergency rule in any or all the Indian states if the security of part or all of India is threatened by "war or external aggression or armed rebellion"[8]

Author's Affiliation: Visiting Assistant Professor, Department of Law, Punjabi University, Patiala, Punjab, India.

Corresponding Author: Sumeet Pal Singh Brar, Visiting Assistant Professor, Department of Law, Punjabi University, Patiala, Punjab, India.

E-mail: sumeetbrarpup@gmail.com

Received on: 19-03-2024 **Accepted on:** 25-06-2024

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When the Constitution of India was being drafted, India was passing through a period of stress and strain. Partition of the country, communal riots and the problem concerning the merger of princely states including Kashmir.[9] Thus, the Constitution makers thought to equip the Central Government with the necessary authority, so that, in the hour of emergency, when the security and stability of the country is threatened by internal and external threats.[10]

EMERGENCY POWERS ITS ORIGIN AND EVOLUTION

India inherited its emergency laws from British colonial statutes.[11] The colonial emergency law was not designed with the intent of balancing powers among different branches of government or of preservation of constitutional order and Fundamental Rights of the common masses.[12] The motive (at that time) behind the legislation enactment was solemnly, to maintain law and order in the colony and ensure effective administration of the British Raj, even at the cost of Indian lives.[13]

The 1935 Act[14] was passed by the British Parliament for managing the affairs of the Indian Colony. There were various provisions in the 1935 Act which established the executive's supremacy over other branches of the government. The head of the executive was the Governor General, a nominee of the British government, who had enormous powers over his dominion.[15]

Emergency provisions in the 1935 Act[16] were introduced not to preserve the constitutional order, but to provide an opportunity to the colonial rulers to declare a state of siege or to take extra-constitutional steps.[17]

Section 12(1) of the 1935 Act[18] defines some special responsibilities of the Governor General, including '(a) the prevention of any great menace to peace or tranquillity of India; (b) safeguarding of the financial stability and credit of the Federal government'. This section is the source for granting a *carte blanche*[19] to the Governor General and the Governors of Indian states for proclaiming emergency and promulgating laws accordingly.[20] It undertakes a clause by clause analysis of emergency provisions of the 1935 Act, in light of the three limitations of constitutional emergency powers, namely: last resort, time-bound and preservation and re-establishment of constitutional norm.[21]

The 1935 Act defined two types of emergencies: those emerging from a failure of constitutional machinery (s 45); and those arising due to 'war or internal disturbance' (s 102). In the case of failure of constitutional machinery, the Governor General had vast discretionary powers to proclaim emergency at the Federal level.[22] In contrast, the Federal Legislature was toothless and had no role to play in circumscribing the authority of the Governor General either by ensuring that the emergency was proclaimed as a last resort or in checking the Governor General's law making powers for the duration of the emergency.[23] Nonetheless, the proclamation of emergency had to be approved by the British Parliament within six months of its proclamation, and this extended the period of the emergency for another year from the date of such approval.

Overall, an emergency could not carry on continuously for more than three years.[24] Thus, the Governor General's emergency powers were time-bound under the first kind of emergency. However, the laws made pursuant to the exercise of emergency powers could continue to have effect for up to two years after the emergency had expired, unless repealed or re-enacted by the Federal Legislature.[25] Similar emergency powers vested in Governors in their respective provinces, empowering them to proclaim emergency at the provincial level (s 93).

In the second type of emergency, emerging from war or internal disturbance, the power of proclamation of emergency once again vested in the Governor General without any checks and balances to ensure its use only in extreme circumstances.[26] As with the first kind of emergency, the British Parliament had to approve the proclamation within six months. However, the second kind was not time-bound and was not subject to any form of legislative approval for continuance in force.[27] Nevertheless, the law making power with regards to provinces during the emergency was granted to the Federal Legislature. Still, the ultimate authority to repeal or approve a statute remained with the Governor General.[28]

In effect, the 1935 Act authorized the exercise of virtually unqualified powers by the Governor General without the input of the local legislative assemblies.[29] Moreover, the 1935 Act was devoid of enforceable Fundamental Rights, which meant that to begin with, their derogation or suspension through emergency powers was not an issue. As underscored, the British Parliament was devoid of Indian representation, therefore, it had no interest in protecting the rights and liberties of the Indian people or, in other words, it did not have the incentive to serve as a watchdog on executive powers exercised in India.[30]

DEVELOPMENT OF CONCEPT OF EMERGENCY PROVISIONS IN INDIA

India got freedom on 15th August 1947. During the days of Independence India was facing great geographical, political and other challenges of newborn country.[31] Inevitably these challenges highly influenced the drafting of the constitutions of Independent India. Strong sentiments followed the making process of the constitution.[32]

Constituent Assembly was formed to draft the constitution of Independent India.[33] The major deliberation of founding fathers were to make strong centralizing techniques and to include constitutionally guaranteed fundamental rights as they were themselves witness to the horrors of Second World War.[34] The freedom fighters have themselves experienced the effects of preventive detention so there was express disagreement to the inclusion of wide emergency powers. The adoption of Universal Declaration of Human Right[35] was another influential factor.

Ideas were also borrowed from other democracies like Germany, Ireland, Canada, Japan, Britain and America. The new constitution was largely based on the Government of India Act. 1935. However certain improvements under emergency provisions were introduced,

A draft was prepared by the constitutional expert Mr. B.N. Rao. Clauses 160,181 and 191 respectively authorized the Governor, the President and the Government to declare an emergency on their satisfaction. Excessive powers were given in the hands of executive. Some reforms were made by the Revision committee on the proposed draft of emergency provisions. A new chapter was created. Articles 275 to 280 of the revised draft contained the emergency provisions.

The founding fathers argued, debated and discussed these crucial powers at great length.[36] The members of the committee strongly disagreed to some of the contents of emergency provisions. Different arguments were put forward by the members and apprehension of misuse of wide powers in the hands of executive was expressed. Excessive reliance on good faith of the future executives was questioned. Some major changes were suggested and debated upon by great stalwarts of that time who represented deferent parts of India and were members of Constituent Assembly. Dr. B. R. Ambedkar, K.M. Munshi, Kunzuru, Gopalaswami Ayenger, AlladiKrishnaswamiAyyar, K.T Shah, K. Santhanam, to name a few who have contributed to the shaping of such important part of the constitution.Articles of Draft constitution took shape after long debates and deliberations.[37]

- **Draft Article 275**

Following Improvements were made to the draft article:

'War or domestic violence' were replaced by 'war or external aggression or internal disturbance' Period of six months for proclamation of emergency was reduced to two months. Vesting of excessive powers in the hands of President to be restricted, also that there must not be declaration of emergency only on apprehension basis but there should be actual danger existing, and apparent. Peoples liberty must not be at stake on the whims of an executive. The draft Article 275 was adopted with certain changes in the form of Article 352 thereby as it stood originally in the constitution.[38]

- **Draft Article 279**

Article 13 (Present Article 19) itself takes care of emergency as they are not absolute. So there should not be automatic suspension of the rights. Parliament alone should have power to legislate during emergency. Even complete deletion of Article 279 was suggested in view of the Article 280

The draft Article 279 was adopted finally in the form of Article 358 in its original form.[39]

- **Draft Article 280**

The suggestions put forward by the assembly pertaining to Article 280 were as under

President's satisfaction was to be restricted by adding 'subject to the approval of majority of each house of parliament'. There are certain rights which cannot be suspended howsoever grave the emergency may be. Order must specify the rights that are to be suspended. Power should vest in the Parliament and not in President. The Parliament should have power to safeguard the freedom even in emergency. It was argued that power of the Supreme Court to review executive actions should not be taken away. If State is empowered to go beyond the Judiciary and override it 'there will remain nothing but the law of jungle'. They cautioned against misuse of this power in future. Ultimately three main improvements were made:

1. Order of President may apply to whole or part of India.
2. Order may not suspend the enforcement of all fundamental rights.
3. Order to be placed before the Parliament.

The draft Article 280 was adopted as part of constitution as Article 359.

Articles 352, 353, 358 & 359 originally figured in the constitution as the main Articles containing emergency provisions. They were adopted by the constituent assembly.[40]

- **Other provisions relating to emergency**

1. **Article 22**

Power of preventive detention under the said Article was a great point of worry for the constitution makers. This power remained subject of great criticism throughout. Part III of the constitution along with guarantees of personal liberty, different freedoms, equality and right of judicial review, contained the provision of preventive detention without any charge, which was available even in peace time, though certain safeguards were also provided. Nation had gone through the experience of harshness of such powers so there was discontent about its inclusion. Tremendous misuse of the power was feared which proved right in the future. Its misuse, harshness and its adverse effects on personal liberty have been discussed in other chapters of this work in details.

2. **Article 123 and 213**

Under these Articles executive is given power to legislate when the house is not in session. That means Presidents and the Governor were empowered to issued ordinances if the situation in their opinion so demands. This power was misused many times by both central and state governments. The Supreme Court declared that this powered is not immune from judicial review.[41]

Under the power number of ordinances, enactments, or repeal of many statutes were made. The process of passing of Bills in parliament was not observed properly. Such ill practices by government were not even been published or discussed because of press censorship imposed during emergency.

- **Amendments to the constitution**

Emergency provisions have been extensively amended. In most of the cases not much meaningful debate in the parliament could take place because of emergent nature of the situation.

I. 38th Constitution Amendment Act of 1975

The amendment was enacted during emergency to make certain modifications in the provisions. Art 352 was amended with a view to make the proclamation of emergency of 1975 beyond any question. It excluded judicial review of the satisfaction of President under Article 352(1).The amendment added clause 5 to Art. 352 which declared that the "satisfaction" of the President mentioned in Art, 352(1) and (3) "shall be final and conclusive" and "shall not be questioned in any court on any ground," It was further declared that "neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of a declaration made by proclamation by the President to the effect stated in clause (i) or (ii) the continued operation of such proclamation." The 'satisfaction of the President in declaring the emergency was thus sought to be placed beyond judicial scrutiny.[42]

The Presidential 'satisfaction' to issue proclamation was declared to be 'Final and conclusive.' These provisions were made as a matter of abundant caution because the courts in several pronouncements had already taken the position that "the necessity of immediate action and of the President. He is the sole judge as to the existence of the circumstances necessitating the making of an ordinance. His satisfaction is not a justifiable matter. It cannot be questioned on the ground of error of judgment or otherwise in court,"The amendment provided for another proclamation of emergency even when there was already one proclamation was in existence. The provision was to ensure that there might be no legal hindrance in the way of having two proclamations of emergency on two different grounds operating at one and the same time. Amendment added new clause (1A) in Article 359-The effect of which was that now not only the remedy but the rights themselves are suspended.[43]

II. 39th Amendment Act of 1975

Upon the petition of Raj Narain in 1975 the Allahabad High court declared that Prime Minister Indira Gandhi's election to Loksabha was null and void. This led to the enactment of the Constitution Thirty- Ninth Amendment Act, 1975, It introduced changes in the method of deciding election disputes relating to the four high officials of the State, viz, president Vice. President, Prime Minister and the Speaker. As regards the President and Vice-President, the basic change introduced was that jurisdiction was taken away from the supreme Court to decide any doubts and disputes and disputes arising in connection with their election.[44]

Elections of the Prime Minister and the speaker to the Parliament were also taken out of the election dispute settling mechanism envisaged in Art.329.

The Thirty- Ninth Amendment did not stop here. It went further and sought to nullify the High Court decision voiding the election of Prime Minister Indira Gandhi and to declare it to be valid.The

Thirty-ninth Amendment also extended immunity to a number of statutes from judicial purview on the ground of infringement of fundamental right by including them in the Ninth Schedule.

III. 42nd Constitution Amendment Act of 1976

It is the most controversial and debatable of constitutional amendment ever undertaken in India. It introduces number of modifications in the constitution. The most objectionable feature was that it was undertaken during emergency period, when most of the opposition leaders were detained in jail under preventive detention. Some of the changes were intended towards more powerful executive away from Judicial scrutiny. The dominant thrust of the amendment was to reduce the role of courts. Specially High Court in the judicial and constitutional process.

The justification given was that it is to remove hurdle & obstacles to socio economic legislation. The important modifications made under the amendment were as follows:

- Suspension of Article 19 under Article 358 extended to whole of India whereas the order of President under Article 359 (1) may extend to the whole of India or any part thereof. But this distinction will no more be there.
- Previously it was such that even if the security of a part of India was threatened the emergency had to be declared u/a 352 throughout the whole of India. The 42nd amendment rightly removed this defect.
- Another change made in Art 352 was to authorize the President to vary proclamation of emergency. President could revoke but could not vary. The proclamation of varying an earlier proclamation had to undergo the same process in Parliament.
- In various Articles dealing with fundamental rights, certain changes were made with a view to dilute the over- all efficacy of these rights.

The 42nd amendment was regarded as an attempt to institutionalize emergency in the country forever. To curtail the power of the High courts and the Supreme Court to review legislation and give redress to the individual against administrative excesses. Art 368 was sought to be amended to make parliaments amending power beyond judicial review.

IV. *44th Constitution Amendment Act modified the emergency safeguards as follows:*

The 44th amendment undid most of the aberrations and distortions introduced in to the constitution by the 42nd amendment.[45] This was done to achieve few objectives.

1. To ensure that fundamental rights were not restricted or taken away by the majority in Parliament.
2. To ensure that the power to proclaim and emergency was used properly and not misused for personal or partisan ends.
3. To ensure that fundamental or basic freedom were not easily interfered by Parliament. Certain important procedural safeguards were provided as under.[46]
    - Prior to 44th amendment one of the grounds on which emergency could be declared under clause 1 was internal disturbance. These word were vague and gave wide discretion to the executive to declare emergency even on flimsy ground. The expression "internal disturbance" was substituted with the expression "armed rebellion."
    - The advice to the President to proclaim emergency shall be rendered by the Cabinet in writing. The Emergency Proclamation, which was to be approved by both houses of parliament by resolution, passed by a simple, majority was amended to be approved by special majority.[47]
    - The proclamation once approved could remain in force for any length of time without fresh parliamentary approval. Now this amendment provided for its continuance for the period, which could be continued for a further period of 6 months if approved again.[48]
    - The jurisdiction of the high court to issue writs in the nature of Habeas Corpus will not be suspended so far as Articles 20 & 21 is concerned[49]
    - It amended Article 22 by which the advisory board has been made truly independent. It provided that a person cannot bSe detained beyond 2months unless the detention has been approved by the Advisory board and the power

conferred on the parliament to provide for longer period has been taken away.[50]

- The 44m amendment controlled the power of executive to prolong the operation of emergency unnecessarily, proclamation may now remain in force . In the first instance for one month, if approved, shall remain in force for 6 months unless revoked earlier.[51]
- The most remarkable change the amendment made to Article 359 was to the effect that fundamental rights guaranteed by the Articles 20 & 21 could not be suspended by Presidential order under Article 359 (Mrs. Gandhi got sub-Articles (4) inserted in the Constitution to legalize the second proclamation) as sub-Article (4) has been deleted by the 44th Amendment.

CONCLUSION

Since pre-independence right through the colonial rule, India had been experiencing the adverse effects of emergency rules over the civil liberty, the most cherished right of everyone. At the time of the formation of the Indian constitution certain factors had greatly influenced its construction specially the emergency provision. Emergency power already existed in the form of Government of India Act 1935. The horrifying experiences of Second World War also had its adverse effect in the mind of citizens. Apart from these political situations, India went through freedom struggle. It had persuaded the constitution makers to have a strong center as the country was also facing the problem of secessionists who were not in favor of making of union of India.

All these factors affected the adoption of provisions relating to emergency, empowering executives with extra ordinary power. Though the founding fathers have very strongly opposed and expressed apprehensions of future misuse of the political emergencies. The history of independent India has proved all the doubts to be true. The third emergency exposed the weaknesses of the safeguards against the abuse of emergency power. It has also reminded that even judiciary cannot be relied against executive oppression after Supreme Courts disappointing judgment in Habeas Corpus case. The experience of hampering of personal liberty has shaken the Indian Judiciary and the political world alike. Greater need has been felt to check the exercise of executive power by stricter administrative and constitutional reforms.

The history of post emergency period and passing of other draconian laws show that still the life and liberty of citizens of the country is in hands of executive. A lot is still pending to be done.

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