IMPLICATIONS OF EMERGENCY ON FUNDAMENTAL RIGHTS: POSITION BEFORE AND AFTER THE CONSTITUTION 38TH, 42ND AND 44TH AMENDMENTS

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ABSTRACT

The life of a nation is defined by times of peace and times of distress, constitutions are enacted to provide framework of governance for the administration of the state for all times. The defining features of democratic form of government which ensure fair representation and just redressal of grievances are critiqued for being sluggish when facing major adversities. Most Democratic constitutions of the world concede this fact and contain separate set of administrative norms for these emergencies, wherein they try to tread on the thin line of relinquishing requisite space for the executive to take swift decisions while diluting the accountability mechanisms and yet preserving basic rights of the citizens even in challenging circumstances. The framers of the Indian constitution tried to achieve this balance but the eventual exigencies enabled the contemporary regimes to almost upend the balance by tilting the scales firmly in the favour of the all-encompassing state. This essay aims to trace the impact of the constitutional amendments made during the proclamations of emergency on the operation of the part III of the constitution and how the document proved its resilience amidst the incessant onslaught on liberty.

Key Words: Emergency Provisions, Part XVIII, Fundamental Rights, Constitutional Amendment Acts, Emergencies and Rights.

Introduction

The contemporary understanding of democratic constitutionalism associates two primary concerns that a constitution must redress; firstly, to provide a framework of governance and its constituent institutions and secondly, to ensure some basic rights in the form of redlines which cannot be overstepped by state actors. However, the emphasis on constitutions as the guarantor of rights is more modern than its other primary function as the older constitutions like the

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American Constitution[2], the Canadian Constitution[3] or the unwritten British constitution did not contain a set of guaranteed rights although they were later added through amendment as 'bill of rights'[4] in the former two while the British do not to this day have textually defined constitutionally sanctified rights. Therefore, in that sense constitutions all over the world can be clubbed and differentiated through their various defining features; one of the ways by which they can be distinguished is through classifying them on whether they enumerate a set of core human rights guaranteed to the citizens with or without regulatory restrictions contained within the framework of their textual orientation. The Indian Constitution belongs to this category enshrining, under Part III, a list of non-derogable fundamental rights.

Democracy as a system of government is most suitable for the conservation and observation of the basic rights of the population in peace times owing to the institutionalised systems of checks and balances ingrained within its normative framework. However, the strength of democracy which lies in consultation, consensus and representation becomes the source of its criticism as its inability to swiftly and sufficiently address the contingencies arising from times of great national distress like war from external aggressors or significant internal disturbances. This aspect is generally recognized and incorporated by majority of the constitutions of democracies wherein provisions enabling special powers to the executive get triggered in cases of grave contingencies wherein rights of the populous yield to those of the state to ensure its continued existence.

Similarly, the Indian Constitution also contains extraordinary provisions in Part XVIII under the head 'Emergency Provisions'. Various provision under this part specify the process of proclamation of emergency (Article 352); the effect of such proclamation (Article 353); the impact on revenue distribution between the center and the states (Article 354); the onus on the Union to protect the states (Article 355); in case of failure of constitutional machinery in states (Article 356); exercise of legislative power of the state by the parliament; suspension of rights under Part III of the Constitution (Article 358-359) and Financial Emergency (Article 360).

[2] The Constitution of the United States of America was adopted in 1787.
[3] The Constitution Act of Canada unlike many other constitutions around the world is not a single document instead a series of documents which was first adopted in the year 1867 and the most recent being the Constitution Act of 1982.
[4] The so-called 'Bill of Rights' which is a collective term given to the first Ten Amendments of the American Constitution was adopted on 15th December 1791 after the three-fourths of the then state legislatures ratified the same; while for Canada the Bill of Rights were adopted at a much later date in 1960.

Briefly, these extraordinary provisions convert the federal structure[5] created by the Constitution wherein the governing powers are distributed between the Union and the States into a Unitary form of government where the constituents *viz.* the states lose their independent character and yield their powers in favour of an all-encompassing center to increase the speed, efficiency and implementation of the decision making processes.

For the purposes of this essay the implication of the proclamation of Emergency on the Fundamental Rights of the citizens would be discussed in the light of the three major constitutional amendments *viz.* Constitutional Thirty Eighth, Forty Second and Forty Fourth Amendment Acts which were promulgated during various proclamations of Emergencies altering the structure of Part XVIII of the Constitution substantially, to clarify some ambiguities while at the same time arising some more.

The Advent of Crisis

As has been briefly mentioned above, the proclamation of Emergency entails the accrual of sweeping powers to the Union for handling crisis situations; in the Original unamended constitution these crisis situations were expressed through three phrases – war, external aggression and internal disturbance. Each had their different spheres of operation however none of these phrases were defined in the Constitution especially considering the wide amplitude of circumstances which could be covered under the term 'internal disturbances'.

During the tumultuous years of 1960's and 70's; India was dragged into numerous unprovoked conflicts by its two northern neighbours. During those wars, emergency was proclaimed which lasted for far longer periods than the actual duration of the wars, in one case a single proclamation ended up lasting over two wars.[6] When considered from a strictly constitutionalist rights based paradigm, it was a cause of concern as the constitution, originally, required a proclamation to be made by the President on the advice of the cabinet of ministers, not necessarily mentioning the reasons for such a proclamation and the proclamation was to be laid before each house of the Parliament within 2 months to be approved by each house. However, interestingly it did not mention an automatic expiring or re-approval limit once a

[5] The critique of the Indian constitution is that it is it is 'Quasi-federal' even in its natural form refer Wheare, K. C., FEDERAL GOVERNMENT *Oxford University Press*, 1946 however, in case of an emergency the constitution permits even further removal of the traces of Federalism.

[6] The First Emergency was proclaimed in 1962 during the Ind-China war, 1962 however, it continued till 1968 which encapsulated the Indo-Pakistan war of 1965 within its operation.

proclamation was so laid and approved by the parliament, it could only be revoked by a subsequent proclamation revoking the previous proclamation.

It is for this reason that the proclamations made during the wars of early 1960's extended till the end of that decade without the Union having to do anything more than proclaiming it and having it approved only once. This formulation was also sanctified by the Supreme Court in P. L. Lakhanpal v. Union of India[7], when the court held,

> "*The Article [352] requires only a declaration of emergency threatening the security of India by one of the causes mentioned. The words "to that effect" can have no other meaning. The power to make the declaration can no doubt be exercised only when the President is satisfied about the emergency, but we do not see that the Article requires the condition precedent for the exercise of the power, that is, the President's satisfaction, to be stated in the declaration. The declaration shows that the President must have satisfied himself about the existence of the emergency for in these matters the rule that official acts are presumed to have been properly performed applies and there is nothing proved by the petitioner to displace that presumption."* (Emphasis supplied)

In 1975 upon the declaration of the election of the Prime Minister of India as void by the Allahabad High Court in The State of Uttar Pradesh v. Raj Narain[8]; another proclamation was made by the President on the 25th of June, 1975 on the ground of 'internal disturbances'. Thereafter, the Parliament passed the Constitution (Thirty-Eighth Amendment) Act, 1975 (hereinafter as Thirty-Eighth Amendment Act) which had a profound impact over the operation of fundamental rights after the proclamation of Emergency.

Article 358 titled, "Suspension of provisions of article 19 during emergencies"; before the Constitutional 38th Amendment read: "*[1] While a Proclamation of Emergency is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the*

[7] [1967] A.LR. (S.C.) 243.
[8] 1975 AIR 865.

incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect: …" (emphasis supplied).

The effect of the provision suspends the operation of the seven[9] freedoms contained in the Article automatically as soon as the emergency is proclaimed by the president. While for the other rights enumerated in the part III; the corresponding provision is Article 359 titled, "Suspension of the enforcement of the rights conferred by Part III during emergencies." which declared, *"(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order." (emphasis supplied).*

Therefore, the constitution envisioned two separate approaches for the rights in the Part III, it made a differentiation between Article 19 and other Articles of the Provision by putting them on separate footing wherein the former gets suspended without any covert act by the executive, but other rights had to be expressly suspended through an order declaring that effect.

There was another important distinction which existed in these two provisions before the Thirty-Eighth Amendment Act with respect to the acts done during the continuation of the emergency/suspension of the rights. Article 358(1) declared that any law which was made while the rights were suspended would cease to have any effect after the revocation of the proclamation but for the acts done during the suspension, it contained a phrase, '*except as respects things done or omitted to be done before the law so ceases to have effect*'. Simply put, it gave *carte blanche* to the state regarding anything done during the suspension by barring the retrospective judicial review of those acts. However, similar phrase was not added in the text of the unamended Article 359 dealing with the remaining fundamental rights.

[9] It is pertinent to note here that at the time of the promulgation of the Constitution (Thirty-Eighth Amendment) Act, 1975; Article 19 had seven freedoms including, *Article 19(1)(f) - the freedom to citizens to acquire, hold, and dispose of the property within the territory of India.* The provision was later deleted vide Constitution (Forty-Fourth Amendment) Act, 1977 and made into a statutory right under Article 300(A).

So, the question begs, did the constitution intend retrospective judicial review over the acts committed by the actors of the state during the declared suspension of rights other than Article 19 or to put it the other way, did the constitution envision complete or partial suspension of the declared rights? For the same, it would be relevant to consult the debates of the framers of the constitution in the constituent assembly to comprehend their understanding of these provisions.

The Framers' intent and the foresight of the misuse

Article 359, numbered as Draft Article 280 was debated on 4th August 1949; prominent members of the Assembly participated in the debate however, the discussion focused more on the impact the Article was likely to have on the fundamental rights than its comparison with Article 358. Almost all the speakers registered their apprehensions about the absolute powers being granted to the executive in case of emergency which could, as contemplated by the framers, last for years on end.

For instance, H. V. Kamath questioned the lack of safeguards within the provision when the proclamation was approved by the house stating,

> "*In article 275, clause (2) (b) and (c)* [Presently Article 352 of the Constitution]*, it is specifically laid down that the proclamation shall be laid before Parliament for its approval. Does this mean that once this proclamation is approved by Parliament the President is free to do by order as he likes? If that be so, it is a pernicious article. The suspension of fundamental rights is not an ordinary matter. It is a very grave matter. I will go so far as to say that it is even graver than the gravest emergency with which the State may be confronted. Do we in that eventuality empower the President to declare by order that these fundamental rights, conferred by article 13 shall be suspended? I hope that will not be done. I hope that is not the intention of this House."*[10]

While H. N. Kunzru criticised the unnecessary over-inclusion of the fundamental rights in the suspension powers of the President when he remarked,

[10] H. V. Kamath, Constitutional Assembly Debates, Vol IX, Document 111 Paragraph 120, Aug 4, 1949. available at: https://www.constitutionofindia.net/debates/04-aug-1949/.

> *"It is not necessary that, when a Proclamation of Emergency has been issued by the President, all the fundamental rights should be suspended. Take for instance, the right of a man, to whatever caste he belongs, to stay in a hotel or go to a restaurant or draw water from a public well. Is this right too to be suspended while a Proclamation of Emergency is in force? All that is desired is that, so far as the right to free speech or the right to form associations or the right to assemble peaceably are concerned, it should not be enforceable through the courts of the land while a Proclamation of Emergency is in force."*[11]

Prof. Shibban Lal Saxena meanwhile highlighted the dangers of restricting the powers of the court as the last resort for the upholders of liberty claiming,

> *"Here we are invading the powers of the Supreme Court in regard to the liberties of the subject, not only the liberties guaranteed under article 13* [Presently Article 19 of the Constitution] *but all the rights plus the right of the subject to obtain a writ of habeas corpus. ...*
> *... But in this free India we are providing for the suspension of this most fundamental article and section 491 of the Criminal Procedure Code will not have any effect if the article is adopted. Supposing a war lasts for 'ten years; is nobody to have the right to approach the Supreme Court with an application for a writ of habeas corpus during that whole period? This gives the bureaucracy the right to arrest any person without any cause whatsoever. One cannot even go to the Supreme Court for redress. I do not think that in any emergency this right of the Supreme Court to do justice should be taken away."*[12]

It is submitted that the framers while thoroughly critiquing the extraordinary deference to the executive in times of crisis did not consider the silence on the nuance of retrospective judicial scrutiny to the acts of the executive during the operation of the emergency within the text of the provision, rather, they considered the suspension to be absolute and therefore, criticised this absolute impunity. The state, however did not intent to leave anything to the chance and made

[11] *id* at H. N. Kunzru, paragraph 143.
[12] *id* at Prof. Shibban Lal Saxena, paragraph 130.

corrective alterations when through Section 7 of the Thirty-Eighth Amendment Act, Parliament inserted clause (1A) in Article 359 to match the text of the provision with Article 358 thereby foreclosing any possibility of retrospective judicial review to the acts of the executive during which the proclamation sustains; also, the amendment provided that the declarations could not be challenged before any court on any ground[13].

The Final Blow to Liberty

Further, during the continuation of the proclamation in 1975, Parliament enacted Constitution (Forty-Second Amendment) Act whereby the power of the executive to restrict the fundamental rights was further increased. Through Section 48 of the Amendment Act, the phrase, *"in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation"* was added to Article 352(1) meaning thereby that emergency could be declared for only a part of the of territory of India thereby escaping large scale attention and scrutiny which would be afforded to the act of proclamation if the whole country is declared in a state of crisis.

Similarly the amendment act also added provisions to Article 358 and 359 to give effect to the provision in Article 352 wherein a proviso was added to both the articles through which the legislature and the executive were empowered to make laws and take actions in the areas where the emergency was not proclaimed, in a case where a proclamation was made for only a part of the territory of India, in the same way as if emergency was proclaimed in that area if it resulted in securing the affected territory. The net outcome of this amendment was that the President could proclaim an emergency without accountability[14] for only a part of the territory of the country but the legislature and the executive could, in effect function in other parts of India with impunity by merely showing some nexus of the laws and actions with the affected territory.

This eventually was in a manner foretold by Mahavir Tyagi in the Constituent Assembly when speaking about the deference to political power he had warned of a similar eventuality, he had quoted,

[13] Sub Clauses 5 (a) & (b)(i)(ii), Article 355 of the Constitution of India, 1950.
[14] *Ibid.*

> "*So, while giving more powers to the State, we as the representatives of the people and also as the judges of the rights of the people, must bear in mind the fact that the state might also change bands. And that the future governments might not be so considerate towards the rights of the people, and that they might also misuse these powers. The only guarantee that the people have against the high-handedness of their State is the Court. And so if in our enthusiasm we empower the State to go beyond the judiciary and override it, there will remain nothing but the law of the jungle. There will be nothing to control either the government or the people."*[15]

Incremental Rectifications

Finally, after the return of political stability to the country post the defeat of Indira Gandhi-led government at the center in the general elections and the lifting of the emergency, the Janta Party government brought in Constitution (Forty-Fourth Amendment) Act, 1978 with the mandate to reverse the excesses which were committed with the Forty-Second Amendment; however, the approach eventually employed was more of caution than of reversal to the pre-emergency era of 1975. The major amendment was made regarding the process for proclamation of the emergency and to make its continued operation more accountable. For instance, Section 37 of the Amendment Act replaced the term 'internal displacement' with 'armed rebellion' – a phrase although still undefined yet limited in scope which could be discernibly applied to ground reality.[16]

Further, the decision of the Union Cabinet to seek a proclamation from the President is now to be given in writing mentioning the reasons for its requirement[17]; the said proclamation is to be laid before the parliament within a month of its issuance[18] and in no case a proclamation could continue for a period of more than six month from the date of its approval without it getting re-approved.[19] As far as Article 358 and 359 are concerned, the Forty-Fourth Amendment Act made an encumbrance upon the legislature and the executive to mention which act or action was being made/taken for the purposes of the emergency and no law or action which did not

[15] *Supra* note 10 at Mahavir Tyagi, Paragraph 144.
[16] Note the Emergency in 1975 was proclaimed on the very broad of ground of 'internal disturbances' without mentioning any specific circumstances which challenged the unity and security of the state and merited such extreme measures.
[17] Sub Clause 3, Article 352 of the Constitution of India, 1950.
[18] Sub Clause 4, Article 352 of the Constitution of India, 1950.
[19] Sub Clause 5, Article 352 of the Constitution of India, 1950.

have such a recital could claim protection under those provisions[20]. The most important alteration by the amendment act was made in Article 359 whereby Articles 20 and 21 of the Constitution could not be suspended by the executive under any circumstances thereby preserving the life and liberty from the arbitrary action of the state under the garb of the crisis[21]; this was a culmination of the personal experiences of the legislators who had to face arbitrary detentions by the state during the previous emergency.

Conclusion

The intention of the framers, especially the Drafting committee in the assembly, was to emphasise on the capacity of the state to redress the crisis without getting mired with the technicalities associated with the institutional delays in following due process of peace times when faced with an existential threat both internally and externally. It is especially apparent when considered that even under heavy criticism of deferring too much to the wisdom of the political executive composed from the majority group in the legislature; the framers stuck to their desire of including these extraordinary powers within the framework of a welfarist constitution. However, the worst fears of the critics came true during a short period of absolute uncertainty wherein the powers to preserve the nation were misused to preserve the interests of a political group through massive assaults on individual liberty. Nevertheless, the maturing republic returned to its democratic roots making self-corrections along the way proving the resilience of the constitution and the institutions built therein. Although, there are still some important questions which remain unanswered in the form of excesses endured which could, in the time of future upheavals cause similar pains which require further safeguards so as to reign in the exploitative tendencies of a regimes looking to capitalize on the events of common distress.

[20] Sub Clause 2, Article 358 and Sub Clause 1B of Article 359 of the Constitution of India, 1950.
[21] Sub Clause 1A, Article 359 of the Constitution of India, 1950.