CHAPTER V

Emergency Provisions under the Indian Constitution

5.1 Introduction

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5.1 Introduction

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. 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. Emergency as crisis of government is an old concept, many incidences are found in the politico developmental history of India.

The ancient Indian jurists greatly highlighted the importance of justice and righteousness with a supreme law which bound all men including the King who has never been the creator of law and beyond its pale such is the Upnishadik core content of legal system adopted in the code of Manu one can find the following teachings.

\[\text{[i.e. Justice destroyed, destroys its destroyer; and justice preserved preserves its preserver.]}\]

\[\text{Hence, never destroy justice, lest being destroyed, it should destroy thee' Manu VIII 14}\]

1. Dhyani Dr. S.N 'Fundamentals of Jurisprudence- The Indian Approach' p.3.
Provisions of Constitution of India that confer emergency power to the executive need to be studied in the light of philosophy need and probable chance of abuse in future.

This chapter attempts to analyse the provisions of emergency powers right from its origin and down to its misuse by the executive. This study covers all the subsequent amendments and concludes with identifying the areas that need attention and rectifications.

5.2 EMERGENCY POWERS - ITS ORIGIN AND EVOLUTION:

The emergency provisions under Indian constitution can be traced back to the British rule in India, when by Act of parliament crown established its sovereignty over company's territories in India in 1861\(^2\). The Governor General under the provisions exercised wide powers both legislative and executive. He was also given power to legislate for emergencies. These powers were very sparingly used till the outbreak of First World War, but between 1914 to 1918 it was used for about 26 times. Judicial challenges to invocation of these powers were met with unsuccessful attempts.

In 1919 the famous Rawlette act\(^3\) was passed. This law was intended to be used as an emergency measures, very stringent in nature, it was setout to control the terrorist activities in India. Other important laws used in those times were the provisions in the Code of Criminal Procedure. The court held

\(^2\) Act LXVII of 1861

\(^3\) It was named after the English High Court Judge Justice Rawilette who has suggested the Act
that the provision under the code were to be used to meet the urgent and emergency situation 4.

Then came the Government of India Act 1919 which reaffirmed the powers of Governor General to promulgate ordinances in emergency. Section 72 of the Government of India Act 1919 stated: "The Governor General may, in cases of emergency, make and promulgate ordinances for peace and good governance of British India or any part thereof.

Similar powers were conferred by the Government of India Act 1935. Under this Act. The Governor General could issue a proclamation whenever he was of the opinion that 'a grave emergency exists whereby the security of India was threatened by war or internal disturbance 5. It was used in 1939 for the first time following declaration of war between Britain and Germany. In exercise of its power Defence of India Rules 1939 was framed. It authorised the use of preventive detention powers extensively. It is evident that emergency powers were quite liberally used during British period, which consequently had its effects on the civil liberties of common man.

In later period Rule 26 of the said Act. was challenged many times in the Court of Law. The Court has time and again cautioned against the excessive use of rule making power in the name of emergency. Detention

4. Kamini Mohandas Gupta vs H. K. Sarkar (1913) 38 Mad 489
5 102 of Government of India Act 1935.
powers also attracted the Judiciary and important pronouncements were also made. 

### 5.2.1 Making of the constitution of India

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

Constituent Assembly was formed to draft the constitution of Independent India. 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. 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 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

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6. The preventive Detention Power has been discussed in details in other chapter VIII
on the Government of India Act, 1935. Certain improvements under emergency provisions were introduced.

5.2.2. Draft articles of emergency provision

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. 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, Alladi Krishnaswami Ayyar, 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.

**Draft Article 275**

Following Improvements were made to the draft article:-

'War or domestic violence' be replaced by 'war or external aggression or internal disturbance' Period of six months for proclamation of emergency to be 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 President.

The draft Article 275 was adopted with certain changes in the form of Article 352 as it stood originally in the constitution.

**Draft Article 279-**

Views both in favour of and against its adoption were expressed.

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.

Draft Article 280 :-

The suggestions put forward by the assembly 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 can not 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 improvement 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
5.2.3 Other provisions relating to emergency

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.

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.\(^7\)

\(^7\) DC Wadhwa vs State of Bihar, AIR 1987, S C 579
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.

5.2.4 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.

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.
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.

**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 Lok sabha 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.

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.

42nd Constitution Amendment Act of 1976:

It is the most controversial and debatable of constitutional amendments 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.

M. P. Jain explains the situation in these words- "Above all, the impertinence of fundamental rights was greatly devalued. Thus the whole complexion was sought to change so as to reduce the element of constitutionalism therein."

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 :-

1. 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.

2. 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.

3. 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.

4. Sub-Article 5 of Article 352 inserted by 42nd amendment made the

8 Jain M P- Indian constitutional law ,43rd Edn Central Law Agency,
President's satisfaction in proclamation of emergency final and conclusive and provided that such satisfaction can not be changed in any court on any ground and further barred the jurisdiction of any court to consider the validity of proclamation made by the President and also the continued operation of such proclamation.

5 In various Articles dealing with fundamental rights, certain changes were made with a view to dilute the over-all efficacy of these rights.

6 A new provision, Art 31 D enabled Parliament to make a law to prevent or prohibit anti-national activities or the formation of 'anti-national associations'. The expression 'anti-national activity' was defined broadly. An 'anti-national association' was also defined broadly. No such law was to be void on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by Art. 14, 19 or 31, the law under Art. 31 D was to be made by parliament. In Art. 31 D the word used was 'law' and not 'reasonable law'. Thus, the courts could not adjudge the reasonableness of a law passed to prevent or prohibit anti-national activities or associations. Parliament could thus impose any restrictions it liked on the fundamental rights guaranteed by Art. 14, 19 or 31 through a law made under Art. 31D.

During the course of parliamentary, during discussion at the time of enactment of Art 31D, several members expressed apprehensions at the breadth of the provision. It was suggested that internal disturbance might be caused by a variety of reasons but under Art. 31D any kind of internal disturbances might be termed as 'anti-national'. Art 31D thus placed a great
power in the hands of parliament to affect the rights of the people.

The 42\textsuperscript{nd} amendment was regarded as an attempt to institutionalize emergency in the country for ever. 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.

The 44\textsuperscript{th} amendment undid most of the provision of distortions introduced by the 42\textsuperscript{nd} amendment.

\textbf{44\textsuperscript{th} Constitution Amendment Act modified the emergency safeguards as follows:}

The 44\textsuperscript{th} amendment undid most of the aberrations and distortions introduced in to the constitution by the 42\textsuperscript{nd} amendment. 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-

1 Prior to 44\textsuperscript{th} 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."

2. 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.

3. 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.

4. Ten percent or more members of Loksabha can consider a bill for disapproving the proclamation.

5. 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.

6. Clause (1B) to Article 359 was added that only those laws or executive actions made under Article 359 (1) would attract the protection of Article 359 (1).

7. It amended Article 22 by which the advisory board has been made
truly independent. It provided that a person cannot be detained beyond 2 months 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.

8. The 44th 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.

9. 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.

10. Despite strong pleadings by several members of the constituent assembly it was chosen not to include ‘Non-derogability clause’. The cost of this omission proved very high. Thus partially ‘Non-derogability’ was added to Article 359.

11. Clause 5 to Article 352, which made President’s satisfaction ‘final’, was withdrawn. The position has thus been restored to what it was before the 38th Amendment, thus, it will be for the Supreme court to decide whether it will treat the 'satisfaction' of the President to issue a proclamation of emergency, or to vary it or to continue it as 'final' and 'non-justifiable' or as subject to judicial review on some grounds

Article 19 included the most important right of speech and expression and automatic suspension of total extinguishment of this freedom which is already circumscribed by a number of limitations in the public interest, resulted in blanket ban on the reporting. Following this unpleasant experience Article 358 has been amended to confine any future suspension.

These changes have not yet been notified and so have not been effective so far.

59th Amendment :-

It has amended Article 358 and has inserted the words '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 rights guaranteed by Article 19 will be suspended also when emergency is declared on the grounds of 'Internal disturbance' or 'Armed rebellion'.

5.3 CONSTITUTIONAL EFFECTS TO THE AMENDMENTS

At this stage of discussion it is necessary to highlight the major shortcoming and loopholes in the emergency provisions as originally enacted and where they still lack after different amendments.

An important question still crops up as to what could be the reason that inspite of all safeguards provided nationally and internationally the abuse
of this very important power of the executive prevails presently. Detailed study and analysis of the powers under different articles shall enable us to investigate certain important issues in question:

1. Identifying the accountable persons
2. Ensuring sufficiency of checks that are enshrined in the constitution
3. Specifying measures necessary to check further misuse

Analysis of Article 352

The excesses of the Emergency have focused attention on the following defects of Art. 352 as originally enacted: (a) although in form the proclamation is issued on the satisfaction of the President in reality it is issued on the satisfaction of the union government. The article did not exclude the possibility of a Prime Minister advising the issue of a Proclamation on his or her own initiative without the authority of the Cabinet - as Mrs. Gandhi did, professing that a rule of business enabled her to act as she did. Once the proclamation of emergency had been approved by both Houses within the stipulated period, no provision was made for bringing the continuance of the proclamation before the House for approval every 6 months as had been provided for in Art. 356 (Proclamation on the failure or constitutional machinery in a state). Nor was any machinery provided, enabling members of Parliament to move that the proclamation be disapproved or revoked. The 44th Amendment has removed these defects. These are substantial safeguards against the recurrence of the abuse of the power conferred by Art. 352.
Sub-Article (5) of Art 352 inserted by the 42\textsuperscript{nd} Amendment made the President's satisfaction in proclaiming an emergency final and conclusive and provided that such satisfaction shall not be questioned in any Court on any ground; and further barred the jurisdiction of any Court considering the validity of a proclamation made by the President and also the continued operation of such proclamation. Sub -Art (5) was clearly meant to exclude judicial scrutiny of a proclamation or its continuance.

44\textsuperscript{th} Amendment removed many controversial provision and negativised most of the distortions introduced into the constitution by previous amendments. It restricted the scope of vague ground of such as 'internal disturbance'. It also provided many procedural safeguards to ensure further misuse of power by providing for the special majority for proclamation. Since proclamation of emergency virtually results in amending the constitution it is desirable that the same majority as required approve proclamation at the time of amendment. Periodical review of proclamation was also provided. An innovative procedure of notice in writing to be approved by 1/10\textsuperscript{th} of members was provided for withdrawal of emergency. The issue of the satisfaction of executive to be final and non justiciable was restored to the same as it used to be before 38\textsuperscript{th} amendment. Thus it will be for the Supreme Court to decide whether it will treat the satisfaction of the President to issue of proclamation of emergency to be valid or vary or continue it. 44\textsuperscript{th} amendment continued the provision u/a 352 (9) the power of President to issue proclamation even if there is another proclamation already in existence.
In spite of these safeguards it becomes essential that limitation over power of judicial review be completely barred, as possibility of the Parliament becoming plaint in the hands of Government cannot be completely ruled out.

**Analysis of Article 358**

The curtailment of the freedom of people as long as the proclamation of an emergency was in operation was provided for, in the original Art. 358. On a proclamation of emergency Art. 358 "suspended" Art. 19 in the sense that the State, as defined in Part III, could make any law or take any executive action, which but for such proclamation the State could not have made or taken. Art. 19 were not suspended by a proclamation of Emergency on the ground of armed rebellion. Secondly, such Proclamation protected only that law which contained a recital that it was in relation to the Proclamation of Emergency in operation and protected executive action taken only under such a law. Art 358 does not operate to validate any pre-emergency legislative provisions.

Before 1978 every law made or executive action taken during emergency, which affected Article 19, was protected and was immune from challenge before any court. But if any law was made or action taken before the issue of proclamation, such law could be challenged even during period of emergency. After 44th amendment nothing in Article 358 shall apply to any law or any executive action taken, if that law does not contain a recital to the effect, that it is in relation to the proclamation of emergency in operation. It
clearly means that Article made shall now apply only to those laws made during and in relation to emergency. Article 19 will be suspended only with respect to laws in relation to emergency.

Also suspension of Article 19 applied to whole of India as there was no provision for the proclamation of emergency in part of the territory of India. 44th amendment provided that even though the proclamation of emergency is in respect of part of India but in view of prejudicial activities in that part, the State would be competent to make laws or take executive action U/A 358 in the other parts of the country in which proclamation of emergency does not apply.

It has been noticed that although the opening words of Art 358 were altered so that Art. 19 were not suspended by a proclamation of emergency on the ground of armed rebellion no such change has been made in the opening words of Art. 359.

**Analysis of Article 359:-**

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 its competency.

The 44th amendment has made two significant changes in Art, 359: First, it provides that the President does not have the power to suspend the
enforcement of the fundamental rights guaranteed in Arts. 20 and 21 of the constitution. Secondly, it provides that suspension of any fundamental rights will not apply in relation to any law which does not contain a declaration that such a law is in relation to the Proclamation of Emergency in operation. Thus laws not related to the emergency can be challenged in a court of law even during the emergency. This amendment was in consequence of 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 Article 359 the suspension of right to move any court for the enforcement of fundamental rights are not automatic. It can only be brought about by a Presidential order. Article 359, on the other hand, does not suspend any Fundamental right, but merely authorises the President to issue an order declaring that the right to move any court for the enforcement of such Fundamental Rights as may be mentioned in the order, shall remain suspended for the period during emergency.

Article 359 uses words "any court", which does not mean only the Supreme Court but includes all courts of competent jurisdiction. The use of the expression "any court" cannot be justified by a reference to Article 32. It clearly shows that the other courts empowered by the Parliament cannot have the same status as the Supreme Court to which alone Article 32 (1) is applicable. Hence the words "any court" in Article 359 (1) would include the
Supreme Court as well as the High Court before whom citizens can enforce the specified right.

During the two emergencies courts have shown their reluctance to pronounce on the matter of Presidential power and curtailment of fundamental rights but after the horrifying experience of 1975 the supreme Court changed the attitude and it has taken all the efforts to reestablished itself. Though emergency is an executive action judiciary can not be barred to review the legitimacy of emergency laws. Judicial review of executive action during emergency is a very important political area where the positive development of judiciary can be noticed. The amendments made from time to time have provided many safeguards to prevent the misuse of emergency powers, there still remain doubts that even these safeguards cannot completely check the abuse. J.R. Siwach enumerated structural weaknesses under various amendments, which can be summarized as follows:

1. Armed rebellion has not been defined. How many rebels or what types of arms, over what territorial area would constitute armed rebellion.
2. Does the written cabinet advice to the President provide additional safeguards against the misuse emergency powers? According to him only 'ministers with moral courage' could be trusted under this provision.
3. The expression 'majority of total membership' has been understood differently by different writers. There is all chance of malpractice of arranging 2/3\(^{rd}\) majority for approval of proclamation.

Siwach J.R, "Trends and Challenges to Indian Political System - Misuse of Emergency Powers in India and Nature of Amended. Intutional Safeguards".
4. It is difficult to understand that a special provision has been made for requisitioning the meeting to Loksabha for expressing its disapproval of the continuance of emergency.

5. Periodical approval of proclamation is definite improvement and a step forward.

Another structural weakness of the proposed safeguards against emergency control mechanism is that they do not prevent the dissolution of Loksabha during emergency. The possibility of such a threat to the members of Loksabha by the executive to frighten them cannot be completely ruled out.

As malafide proclamation of emergency is being made justiciable there is doubt that judiciary alone can provide an institutional safeguard for ensuring that the emergency powers are not misused. Mr. Seervai also has rightly pleaded for the deletion for articles 358, 359. He is of the opinion that the union of India can appeal to the love of the people, their country and to the values of free democratic society, of which our constitution is both the guardian and the symbol. People always stood united behind the Government in case of need. So it is a great service to the successful prosecution of a war to give up the ways of a free society than the stern necessity of war demand. He is further of the opinion that free discussion and debate is necessary both from effective direction of war and for maintaining civilian morals.¹¹

5.4 HISTORY OF EMERGENCIES

The First proclamation of Emergency-

On 26th October 1962, after China attack on India, the President issued a proclamation under Article 352 declaring that a grave situation existed whereby security of India was threatened by external aggression. Few days later, the President issued an Ordinance- The Defence of India ordinance 1962\textsuperscript{10} based on Defence of India 1939 that British Government used during Second World War. This allowed the Government the power of preventive detention. The rule also conferred extensive rule making power on Government. Another objectionable feature of it was that it ousted jurisdiction of the court.

The President also made an order under Article 359 (1) suspending the right to move any court for the enforcement of the fundamental rights relating to personal liberty, and right to move any court for protection against arbitrary arrest embodied in Article 21 & 22 respectively. This order was later amendment to include Article 14 (right to equality before the law) along with Articles 21 & 22.

Within 1 month of these rules coming into force, more than 200 members of the Indian Communist Party in various Indian States, including leaders of the opposition in West Bengal, Kerala and Andhra Pradesh, were arrested on the grounds that their activities were against the national interest.
At the end of the fourth month the then Home Minister informed the Parliament that 957 persons had been detained under the Defence of India Rules. These figures show the consequences of the first Emergency proclamation.

The hostilities with China came to an end with the cease fire on 21st November 1962. But the emergency lingered on amidst widespread charges of abuse of its powers by frequent misuse of The Defense India Act. In April 1965 an outbreak of armed conflict between India and Pakistan across the borders in April 1965 followed by a war in September that year. A cease-fire took place, in accordance with a U.N. Security Council resolution and the two Heads of Government signed a declaration known as 'Tashkent Agreement' on 10th January 1966 down the procedure for the normalization.

However, even after the normalization, the Emergency continued in force and criticism of abuse of power began to be voiced even by the Courts. A public campaign led by the former Attorney General Mr. Setalvad and 33 other prominent citizens issued a widely published appeal calling on the Government to revoke the emergency. This campaign received further boost when International Commission of Jurists expressed its concern in public statement circulated world wide. Following these appeals the Government decided to revoke emergency.

On 18th March 1967, the Home minister announced that the Government of India had decided to revoke the state of emergency with the
effect from 1\textsuperscript{st} July. A Proclamation revoking the Proclamation of Emergency was issued.

**Justifiability of the first proclamation of emergency**

The first proclamation was uncontroversial and every body accepted its need. There was justification to the use of emergency power but the rules made can be said to be not in proportion to the seriousness of situation. There was already Prevention Detective Act sufficient to control the situation. There was no justification to barring the court and also prolongation of emergency power was unjustified.

There are three main issues that required attention. First, from, the point of view of the international human rights standards, use of the power of preventive detention without justification has no relevance.

Secondly, principles of proportionality, non-discrimination and also non-derogability of human rights clearly offend suspension of basic rights of freedom.

Thirdly, there is universally recognized principle that emergency should not exceed the period strictly required. It should be restored to the condition to normalcy, as soon as the situation normalises.
The second Proclamation of Emergency-

On 3rd December 1971, following the outbreak of hostilities between India and Pakistan, an emergency was declared for the second time. Following the Declaration of emergency, the parliament adopted the Maintenance Of Security Act 1971 and the Government Defence of India rules, 1971.

MISA replaced Preventive Detention Act [12]. It allowed both center and state Government to detain any one even a foreign citizen, if it was satisfied that detention is necessary. Another Act providing for preventive detention was passed. COFEPOSA, Conservation of Foreign Exchange and Prevention of Smuggling Activity. Hundred of persons were detained under MISA and COFEPOSA, The power was used fairly responsibly. Though ill-treatment, custodial death, encounter death were reported, sweeping powers were given to security to Carry out national defence policies.

As before, even after the hostilities between India and Pakistan ceased, the Emergency continued. It was even reinforced by a proclamation of the President in November 1974 suspending the right to seek the assistance of the courts for enforcement of fundamental rights u/A 14, 21 and 22 with respect to orders made under sec. 3(1) (c) of MISA.

Even before the declaration of revocation to the second emergency in

July 1975, a new Emergency was declared. Based on wrongly assumed threat of 'Internal disturbance'.

**Justifiability of second proclamation of emergency.**

The government continued its practice of prolongation of emergency power, even after cessation of war. This call for an analysis of the administrative ill practices. This attitude was not in confirmation with the national as well as International guidelines regarding emergency.

Again there was no justification to the sudden reinforcement of suspension of rights u/a 14, 20, 21 along with Article 19, which was already under the effects of proclamation.

'India failed all the tests. It also was against the International provision. Jurist and prominent citizens belonging to no particular political creed prejudiced the President and Prime Minister to remove the emergency'[^3].

**The Third Proclamation of Emergency**

Late in the night of 25th June 1975, the President of India signed the following proclamation-

"I, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbances."

This time an "Internal emergency, in earlier June, the High Court of Allahabad had allowed an Election Petition file against Mrs. Indira Gandhi and found her to be guilty of "corrupt practices". The High Court held that she was consequentially disqualified from holding any public office for six years. She appealed to the Supreme Court of India. The Supreme Court was in summer vacation. Justice Krishna Iyer refused to grant her an absolute stay of the High Court judgment. Only a conditional stay was granted. Opposition's Calls for her resignation as Prime Minister, followed widespread agitation throughout the country. The President had been prevailed upon to sign a proclamation of Emergency under Article 352 . On the night of 25 June 1975, without even a prior meeting of the Council of Ministers. The Cabinet met only the next morning endorsing what, as done the night before. Under the constitution of India the President can only act on the aid and advice of his council of ministers with the Prime Minister at its head and not on the advice of the Prime Minister alone, nor of anyone else. On 27 June 1975, the President signed another Presidential order suspending Articles 14, 21 while both the External Emergencies of 1971, and 1974 prevailed the new Internal Emergency proclaimed on 25 June 1975.

This 'Internal Emergency' of 25 June 1975, was the most repressive of all other states of Emergencies. Constitution was unnecessarily amended, extra ordinary power was conferred on the general executives and fundamental rights were severely abridged. Political opponents were taken into custody and held without trial. Twenty-seven Organizations (political and social) were banned. Their office bearers were arrested and detained The
elimination of access to the courts, and in sensitive implementation of forceful and insensitive Government programs like clearance of slums and family planning were implemented rather ruthlessly.  

A rigid and unprecedented press censorship was imposed. There was a complete ban on reporting of speech in the parliament (other than Government Statements) and reports of all cases in Courts, names of detainees, place of detention and all things likely to bring Government hatred or contempt were barred.

The President's satisfaction to declare an Emergency (External or Internal) was declared to be not only final and conclusive, but also non-justifiable.

Fundamental rights under the constitution, rights guaranteeing equality before the law (Art 14) protection of life civil liberty (Art 21) Fundamental freedoms (Art 19) protection against arrest (Art 22) were suspended.

A President Ordinance amending MISA withdrew the statutory requirement of the detainee's right to be informed of the grounds of detention. It was sufficient for the authorities to declare that the arrest was made to "safeguards the security of India".

The right of appeal to the government in case of an illegal detention was abolished;

The constitutional safeguard of scrutiny of every detention by an Advisory Board was rendered useless, since the Advisory Board would have no right to reverse the detention order (for any reason) for one year;

Grounds of arrest were forbidden to be disclosed even to the Courts. Assumably it could be deemed that it was against public interest to disclose the grounds of arrest;

Provision was made that the expiry of a detention order was not a bar to the making of further detention order against the same person. On 18 June 1977 Prime Minister announced her desire to hold the election. This was followed by the release of opposition leaders in order to participate in election. Press censorship was suspended. A coalition of five opposition parties won an absolute majority in lower house of the Loksabha. When the election result were confirmed Mrs. Gandhi revoked the proclamation before the new incumbent took the office.

The formal termination of emergency automatically received some of the most objectionable aspects of legal situations. Numerous commissions were created to investigate complaints arising out of the emergency. The most important was the enquiry conducted by Justice Shah.
Justification for the proclamation of third emergency

Of the two emergencies India had known until 1975, during the first quarter century since the constitution came into force, the justification for the initial proclamation in 1962 and in 1971 was never in doubt. The armed hostilities were there for all to see. Also the declaration followed the constitutional process. But the 1975 emergency- the justification for the proclamation on the basis of internal disturbance was disputed. It exposed the weaknesses of safeguards of emergency provisions provided in the constitution. This perhaps justifies the fear that the founding fathers of India had in their minds and some had even expressed openly.

Following weaknesses got exposed:

The emergency provisions under the constitution eliminate the judiciary and the parliament alone is treated fully to review abuse of government powers. Ideally both the judiciary and parliament together keep the balance during the normal times.

Emergency does not effect the relations between executive and the legislature President acts on the aids and advice of council of ministers.

Emergency provisions does not make the President more or less powerful As legal luminary Alladi said in the constituent assembly "The president" in theory and in practice means always the President advised by council of ministers. Abuse of powers to some extent is inimitable but all such preventable abuse must be prevented by all possible efforts.
If all the safeguards of Indian Emergency mechanism are carefully examined it will be found that they have certain in-built weakness.

1. The constitution provides for parliament to control the executives' process.
2. But the President has an unlimited power to dissolve the parliament.
3. Once the President uses that power, there remains no independent authority to control the government misusing emergency power and to safeguard the citizens' rights.
4. President's emergency proclamation stands for two months in spite of its disapproval by house of parliament.
5. It is only the President that can revoke a proclamation. The 1975 emergency prevailed despite the fact that its proclamation was never put on the table of parliament, which is mandatory under the constitution.

5.5 Post Emergency Period

Emergency was revoked in 1977. 44th Amendment was made to the constitution as a result of horrifying experience the country faced during third emergency by the ruling Janta Party in the center. Efforts were made to plug the loopholes of the constitution to check further misuse of emergency power.

What happened after the institutional reforms that had been made,
and to what extent these reforms helped in protecting the human rights of citizens of the country, is the most important question for consideration.

The polity of India after 1977 witnessed many other severe problems facing the nation. Different types of demands from different states created intensive situations specially Punjab, Jammu and Kashmir, Assam, Nagaland, Manipur Tripura, Meghalaya, Mizoram and Arunachal Pradesh and also Andhra pradesh posed lasting political demands.

Government had to enact anti-terrorist legislations to cope with such political unrest and terrorist activities. From time to time the government enacted different laws. National Security Act 1980.\(^\text{16}\)

MISA was repealed and National Security Act was enacted. It provided for preventive detention for purpose of internal security. Both Central and state governments were empowered. The Act was further amended in 1984 and 1987 to make it more stringent. This Act was widely exercised throughout India. What is mentionable is that although the government assured the United Nations Working Group On Enforced or Involuntary Disappearances in 1997\(^\text{17}\) the Act was highly misused by the government against innocent persons.

Jammu and Kashmir (Public safety) Act 1978, Terrorist Affected Areas

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16. Act no 65 promulgated by President of India on 22 Sep. 1980

(Special Courts) Act 1984, and 1987, Armed forces Act of 1958 and many other Acts which had lesser implications were also enacted by center as well as states. The most remarkable thing about these Acts is that they were used for establishment of special courts.


MCOCA 1999 is a special enactment to deal with separate class of crimes it confers tremendous powers to police also. General law systems were found inadequate to meet new challenges of organized crimes in recent years. A special legislation was promulgated in state of Maharashtra. This Act presents special provisions for prevention and control of criminal activities by organized crime syndicate.

This Act provides for prevention of terrorist activities and stringent and deterrent punishment. More powers are given to the prosecuting agency e.g. any offence which results in a person's death would be subject to fine of
Rs. 1 Lac to 5 Lacs and imprisonment of 5 years. Such stringent punishments are for the first time prescribed under this Act. Prosecuting agencies have also been given power to attach the property of accused, witness would also be more forthcoming in testifying against the accused as this law provides special protection of them.

Many cases are pending before the special court. Also there is no case reported by the supreme court which shows that organized crime is under control. During Mumbai blast case, Anti terrorism squad filed an over 1 Lac cases chargesheeted in special MCOCA Act.\textsuperscript{18}

These Acts provided sweeping and uncontrolled power to the concerned authorities and were bound to be misused by them. Constitutional Validity of these Acts were challenged in the Court\textsuperscript{19}

Even the President’s power to promulgate such ordinances were also criticized and challenged. They were also against the binding provisions of International human right instruments to which India is signatory.

Human right activists, NGOS and many social organizations have specially expressed their concern over widespread misuse of these Acts, specially TADA was highly criticized on numerous accounts. The attempts


\textsuperscript{19} Reported in The Hitvad’ Friday 1 Decembci 2006 under sees. 13 14,20,23 of the MCOCA ACT.
made to challenge these Acts were mostly unsuccessful. The court gave several directions regarding greater degree of fairness in the application of Acts. The main issues before the court were -

- Without any official Proclamation of Emergency situations how can such stern laws can be brought into force.
- Concern was shown about the government's mal intention to enact some of the much-criticized provisions of TADA.
- Many provisions of these Acts were against the constitution as well as International human right protection norms. They can be seen abrogating the binding provisions of International law to which India is a signatory.
- Wide spread allegations of extra judicial execution, rape, torture, harassment and other abuses committed by armed forces acting under the Acts were reported.
- The application of special laws used in normal parts of the country is a serious concern.

5.6 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 can not 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. Consequently Amendments have been made to fill up the loop holes in the concerning provisions. Judiciary adopted revolutionary role and went to preserve and give meaningful interpretation to the constitutional provisions inorder to protect the citizens from the unfettered use of executive powers.

The reforms made got success only to some extent. 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 to be done.

The evaluation of Indian emergency provisions in the light of global standards of protection may guide the future efforts. The next chapters will examine the International as well as regional norms regarding emergency, the jurisprudence of International monitoring bodies, which may help in setting criteria to judge the standard of Indian provisions and future action.

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