CHAPTER IV

EMERGENCY PROVISIONS

(A comparison of non-derogable provisions of ICCPR with corresponding civil and political rights in the Constitution of India)

An emergency is a state of affairs unexpectedly arising and urgently demanding immediate action. In response to an officially proclaimed public emergency which threatens the life of a nation, States, swiftly take measures to meet the exigencies of the situation. An emergency power is ordinarily equated with war power. The 'War Power' in the US Constitution, and the 'Peace, Order and Good Government' (usually referred to as POGG) power in section 91 of the British North America Act, 1867 and section 51 of the Commonwealth of Australian Constitution Act, 1900 are all similarly constructed. In the UK too the discretionary power of the sovereign expands in emergencies.

While every Constitution strives to be imaginative and provides for measures to tackle extraordinary situations of an emergent nature, a state of emergency ensues in its wake an enormous reservoir of prerogative and discretionary power.

Recognizing that States need to take appropriate action to respond to a public emergency Article 4 of ICCPR allows state parties to take measures derogating from their obligations under the said Covenant to the extent strictly required by the exigencies of the situation.

---

193 The Oxford English Dictionary, 2nd edn, Vol.V, Clarendon Press, Oxford, p.176 defines 'emergency' as a political term, to describe a condition approximating that of war; occas as a synonym or euphemism for War; also state of emergency wherein normal Constitution is suspended.
194 Article (4) of the US Constitution states that 'The United States shall guarantee to every State in this Union a republican form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence'.
195 Sec.51 of the Commonwealth of Australia Constitution Act, 1900 states that 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good Government of the Commonwealth, with respect to....'
196 Refer Emergency Provisions under The Indian Constitution, in SUPREME BUT NOT INFALLIBLE, Essays in Honour of the Supreme Court of India, Oxford University Press, pg.134.
197 Refer Annexure II (page xvi) for the full text of Article 4, ICCPR.
The words ‘to the extent strictly required’ in Art. 4 of ICCPR imply that the reaction by the State Party to the exigencies warranted by the public emergency should not be disproportionate.

Para 2 of Art.4 of ICCPR seeks to contain the Human Rights violations that an emergency could bring in its wake and incorporates safeguards. Para 2 states, “No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision”.

The Covenant therefore states in categorical terms that certain civil and political rights accrue to all people at all times. Even a public emergency will not warrant the removal of these rights.

In its interpretation of Article 4, the Human Rights Committee\(^{198}\) has stated that state of emergency must be of exceptional and temporary nature. Two conditions must be satisfied before a state of emergency is declared: the situation must amount to a public emergency which threatens the life of the nation and the state must have officially proclaimed a state of emergency. It stressed that not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation and that the measures introduced derogating from the ICCPR should be limited to the extent strictly required by the exigencies of the situation. The Committee explained this by stating that:

“The mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviours of the State party.”

\(^{199}\) Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, para 4

\(^{198}\) The Human Rights Committee constituted under Art 28 of ICCPR is the monitoring mechanism in the present Covenant.
The Committee further stated that any state introducing measures derogating from the provisions of the ICCPR must be able to justify not only that the situation for which they declared the state of emergency "constitutes a threat to the life of the nation, but also that all the measures derogating from the Covenant are strictly required by the exigencies of the situation."\(^{200}\)

The Committee stressed the duty of the states declaring emergencies to carry out careful analysis under each article of the ICCPR, based on an objective assessment of the actual situation. This is essential because a declaration of a state of emergency does not automatically mean that the states parties to ICCPR, can derogate at will, the non-derogable provisions of ICCPR even when a threat to the life of a nation exists.\(^{201}\)

The Universal Declaration for Human Rights does not allow for derogation under states of emergency, but permits limitations only when they are "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society" (Article 29 (2)).

Also the International Covenant on Economic, Social and Cultural Rights does not make any exception for derogation or limitation in cases of emergency, and allow limitations that are determined by law "only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." (Article 4(2)).

**Other permissible limitations of rights**: Other international human rights treaties either do not allow for derogation of the rights protected under states of emergencies, or allow only for limitations under certain situations, which do not necessarily constitute states of emergency. Such limitations are permissible only under clear conditions. For example, Article 2 (2) of the Convention against Torture specifically states that

\(^{200}\) *Ibid.* para. 5.

\(^{201}\) UN Doc. CCPR/C/21/Rev.1/Add.11, paras 5 and 6.
“[n]o exceptional circumstances whatsoever, whether a state of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

This is consistent with the absolute prohibition of torture, even under states of emergency or armed conflict, as embodied in the ICCPR and international humanitarian law, as discussed below.

Neither CEDAW\textsuperscript{202} nor the Convention on Elimination of All Forms of Racial Discrimination or the Convention on the Rights of the Child has any provisions that allow for limitation or derogation from the rights guaranteed in these instruments in any situation.

Besides, the Human Rights Committee has stressed that states parties are not allowed in any circumstances to invoke Article 4 of the ICCPR as a justification for acting in violation of international humanitarian law or peremptory norms of international law. The Committee stressed that during armed conflict, both international and non-international, rules of international humanitarian law apply and help “to prevent the abuse of State’s emergency powers” particularly the safeguards set forth in the Four Geneva Conventions of 1949 and their two Additional Protocols of 1977\textsuperscript{203}.

\textsuperscript{202} Convention on the Elimination of all Forms of Discrimination against Women
\textsuperscript{203} In international armed conflict, civilian persons are protected under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, and prisoners of war are protected under the Third Geneva Convention relative to the Protection of Prisoners of War. Common Article 3 of the Geneva Conventions prohibits, among other things, the surrender of protected persons such as civilians, wounded, sick and detainees, in non-international armed conflict. These prohibitions are spelled out in more details in the Second Additional Protocol to the Geneva Conventions. The Geneva Conventions do not allow for derogation from fair trial provisions included in them. Indeed, the denial of the right to fair trial during armed conflict can, in certain circumstances, be a war crime. Similarly, prohibition of torture is absolute, even during armed conflict, and cannot be derogated from under any circumstances. Article 147 of the Fourth Geneva Convention defines grave breaches of the Convention, which amount to war crimes. Therefore, those suspected of grave breaches must be tried by the state where they are found, or if this state is not willing or able to try them, it must extradite them to another state for trial, or they may be transferred to an international criminal court.

A third Additional Protocol of 2005 to the Geneva Convention relates to the Adoption of an Additional Distinctive Emblem, Red Crystal besides the existing emblems, Red Cross and Red Crescent. These emblems are to be placed on humanitarian and medical vehicles and buildings to protect them from military attack on the battlefield.
The researcher in the forthcoming paragraphs has attempted to sum up these non-derogable provisions stated in Para 2 of Art.4 of ICCPR and compare it with the Indian position. India adopted the ICCPR on 16th December, 1966 and the Covenant came into force w.e.f. March 23, 1976.

Right to life:

Art.6 of ICCPR\(^{204}\) protects the right to life and declares this as an inherent human right even in times of a public emergency. Article 6 (2) of the ICCPR limits the imposition of the death penalty, in the states that still maintain the punishment, to the most serious crimes in accordance with the law of the land, in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide\(^{205}\). Article 6 (2) of the ICCPR is a non-derogable right under any circumstances including states of emergency. The Commission on Human Rights has emphasized "that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights."\(^{206}\) The Commission resolution also states that death penalty should not be imposed for "non-violent financial crimes or for non-violent religious practice or expression of conscience"\(^{207}\). The resolution calls upon states that still maintain the death penalty to progressively restrict the number of offences for which the death penalty may be imposed; and to establish a moratorium on executions, with a view to completely abolishing the death penalty.

In this regard it is pointed out that India has not acceded to the Second Optional Protocol to the ICCPR\(^{208}\). However the prevailing legal position in India is that the death sentence can be imposed only in grave and the rarest of rare cases.

\(^{204}\) Refer Annexure II (pages xvi-xvii) for the full text of Article 6, ICCPR
\(^{205}\) The various acts punishable under this Convention are- a) Genocide;(b) Conspiracy to commit genocide;(c) Direct and public incitement to commit genocide;(d ) Attempt to commit genocide;(e) Complicity in genocide


\(^{207}\) Ibid. para. 4 (b).

\(^{208}\) Refer Annexure IV for the text of the Second Optional Protocol to the ICCPR.
Thus the matter of awarding death penalty has to be viewed in accordance with *lex-loci* of the State parties, the ICCPR and the Convention on the Prevention and Punishment of the Crime of Genocide. It is pertinent to point out here that the Second Optional Protocol to the ICCPR aims at abolishing death penalty and has not been ratified by India. The Second Optional Protocol creates a non-derogable individual human right not to be executed and prohibits the execution of anyone under the law of a ratifying country. Equally pertinent it is to point out that the UDHR does not mention death penalty.

Article 6(3) of ICCPR states that when deprivation of life constitutes the crime of genocide, all State Parties would be bound by the rules enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide of the said convention.

Recognizing that law encourages repentance, Para 4 of Art.6, ICCPR, states that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Thus amnesty, pardon or commutation of the sentence of death may be granted in all cases.

Para 5 of Art.6, ICCPR, provides immunity from death sentence to minors and pregnant women. Article 37 of the Convention on the Rights of the Child also protects children from capital punishment and 'life imprisonment without possibility of release'. In India according to Section16 of The Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) capital punishment cannot be imposed on a juvenile. The term “juvenile” or “child” for the purpose of this Act means a person who has not completed eighteenth year of age”. Section 16 of the said Act states as follows-

---

209 Law of the land
210 The Second Optional Protocol entered into force in international law on 11 July 1991. As on 30 May, 2006 the Second Optional Protocol to the ICCPR was ratified by 57 nations, and signed by a further 33 countries.
211 This was largely because there was no international consensus on the abolition of capital punishment at the time. William Schabas, The Abolition of the Death Penalty in International Law (2002, 3rd ed) 32-
212 The various acts punishable under Article 3 of this Convention are- a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide (d) Attempt to commit genocide; (e) Complicity in genocide
'Order that may not be passed against juvenile.- (1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death or life imprisonment, or committed to prison in default of payment of fine or in default of furnishing security:

Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is of so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government'.

In India under Section 416 of the Criminal Procedure Code, if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed; and may in its discretion commute the sentence to imprisonment for life.  

In the 57th session of the Commission on Human Rights that met on 25 April 2001 the representative from India stated that though the international community had thus far not reached a consensus on the issue of capital punishment, India agreed with some of the goals of the draft resolution relating to the need to resort to capital punishment only for the most serious crimes and through the due process of law in strict accordance with the international human rights standards. In India, the death penalty was imposed only in the rarest of rare cases, where the crime committed was so heinous so as to shock the conscience of society. It was therefore an exception rather than the rule. A death sentence under Section 302 of the Indian Penal Code is an alternative punishment for murder and must be confirmed by a superior court. The accused had the right to appeal to the High Court or the Supreme Court and to file a mercy petition before the Governor of the State concerned or the President of India.  

---

213 Refer Table III for the salient provision in the Constitution of India and Criminal Laws for Protection of Human Rights.

214 Refer Section 302 IPC, Art. 72 of the Constitution of India regarding the Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases and Art. 161 of the
Article 21 of the Constitution protects the right to life in India. The question of the constitutional validity of the death sentence has been raised before the Supreme Court several times vis-à-vis Articles 14, 19 and 21. However Capital Punishment has been held to not violate the provisions of Art.21 for it amounts to taking away life 'according to procedure established by law'. Section 302 of IPC., the Court has held passes this test. In Rajendra Prasad v State of U.P. the Court held that Article 14 ensures the imposition of 'principled sentences of death' and 'not arbitrary or indignant capital penalty'.

Owing to some differences in the views expressed by the Supreme Court in Jagmohan and Rajendra, the question of the reasonableness of the death penalty was again raised before the Constitutional Bench in Bachan Singh v State of Punjab that again upheld the death penalty and ruled that it was in public interest and did not violate the letter or the ethos of Art. 19.

However in Mithu V State of Punjab the Supreme Court ruled that Section 303 of I.P.C., violates Art.21 and should be struck down because the procedure by which S.303 authorizes the deprivation of life is wholly unreasonable and arbitrary.

In Vatheeswaran, the delay of executing the death sentence beyond two years was held to be sufficient ground to quash the death sentence and have it commuted. Close on heels however in Sher Singh v State of Punjab the Apex Court ruled that delay in execution of the death sentence in itself did not constitute a blanket ground to set aside the death sentence while in Tribeniben v State of Gujarat the Court stated that it would have to inquire into the causes for delay in executing the
death sentence before quashing it holding the view that more often the delay occurred owing to infructuous petitions filed by the petitioners themselves.

A public emergency impinges upon the fundamental rights of citizens. The earliest landmark case regarding the Emergency provisions in India was the Makhan Singh case. In this case, the Presidential Order under Article 359 provided that the right of any person to move any court for the enforcement of a right conferred by Articles 14, 21 and 22 of the Constitution would remain suspended if such person had been deprived of any such right under the Defence of India Act, 1962 or any Rule or Order promulgated under it.

In the Habeas Corpus Case the constitutional validity of Section 16 A of the Maintenance of Internal Security Act (MISA), (now repealed) was challenged. It was argued on behalf of the detenue that the impugned Section was violative of Art.226 in as much as it prevented the High Court from exercising its Writ jurisdiction and determining the validity of the detention. The Court by 4:1 majority, held that Section 16-A was constitutionally valid.

The effect of the decision in the Habeas Corpus Case was that Courts were barred from examining the question of mala fide of the order of detention or the ultra vires character of the orders of detention. It is interesting to note that Section14 of the Preventive Detention Act, 1951 which was similar to Sec.16-A of MISA, was struck down as unconstitutional by the Supreme Court in the case of A.K.Gopalan v State of Madras on the ground that it foreclosed the judicial inquiry of the legality of the detention under the said Act. In view of the 44th Amendment Act, 1978, the decision of the Habeas Corpus case is no longer good law.

Presently Art.20 and Art 21 constitute the non derogable provisions in the Indian Constitution implying that the right to life and personal liberty is guaranteed to all persons both in times of peace and in a public emergency.

---

224 Makhan Singh v State of Punjab (1964) 4 SCR 797
225 Additional District Magistrate, Jabalpur v S S Shukla (1976) Supp SCR 172
226 AIR 1950 SC 27
227 Provides protection against ex-post facto laws, double jeopardy and self incrimination.
Under the influence of the Ninth Amendment of the American Constitution the Supreme Court of India has also applied the theory of emanation and has availed distinct and independent rights out of the existing fundamental rights. Following are some of the rights which have been evolved by being parts of or having emanated from one or more of fundamental rights:

i) Right to travel abroad; 228 (Art. 21)

ii) Right to privacy; 229 [Articles 21 and 19 (i) (d)]

iii) Right against solitary confinement; 230 (Article 21)

iv) Right against bar fetters (Right to Human dignity); 231 [Articles 21, 14 and 19]

v) Right to free legal aid in a criminal trial; 232 (Articles 21 and 39-A)

vi) Right to Speedy Trial; 233 (Article 21)

vii) Right to against Handcuffing; 234 (Article 21)

viii) Right against delayed execution; 235 (Article 21)

ix) Right against Custodial Violence; 236 (Article 21)

x) Right against public hanging; 237 (Article 21)

---

xi) Right to health care or Doctor’s Assistance; \(^{238}\) (Article 21)

xii) Right to Shelter; \(^{239}\) (Article 21)

xiii) Right to pollution free environment; \(^{240}\) (Article 21)

xiv) Right to education of a child till he attains the age of 14; \(^{241}\) (Articles 21, 21A, 45 and 41)

 xv) The Freedom of Press; \(^{242}\) [Article 19(a)]

xvi) Right to know; \(^{243}\) (Article 21)

xvii) Right to compensation; \(^{244}\) (Article 21)

xviii) Right to release and rehabilitation of Bonded Labour; \(^{245}\) (Articles 21, 23)

xix) Right of Inmates of Protection Homes; \(^{246}\) (Article 21)

xx) Right against sexual harassment in the workplace.\(^{247}\) (Article 14, 19 and 21)

The above list is simply illustrative and by no means exhaustive. However, it is clear that the expression ‘right to life’ has been given the widest amplitude by the Supreme Court applying the doctrine of emanation. Despite the reservation expressed by India with respect to Article 9(5) of the ICCPR wherein the Government of India expressed her reservation to pay compensation to victims of unlawful arrest or detention, Supreme Court has time and again awarded compensation to victims and

\(^{237}\) Attorney General of India v. Lachma Dev, AIR 1986 SC 467


\(^{240}\) MC Mehta v. Union of India (1987) 4 SCC 463

\(^{241}\) Unni Krishnan JP v. State of Andhra Pradesh AIR 1993 SC 2178 (FB), 2231-32; Miss Mohini Jain v. State of Karnataka AIR 1972 SC 1858 was partly overruled

\(^{242}\) Express Newspapers v. Union of India, AIR 1958 SC 578


the concept of compensatory jurisprudence is indeed well established in India. It is also pertinent to add that Article 21 covers all natural persons, citizens and refugee populations. In Chandrima Das\textsuperscript{248} pursuant to PIL filed on behalf of a Bangladeshi national gang raped in Howrah Station the Apex rejected the contention that Article 21 applies to only citizens and awarded 10 lakhs as compensation. In National Human Rights Commission v State of Arunachal Pradesh, AIR 1996 SC 1234, the Supreme Court held that Chakma refugees who had come from Bangladesh due to persecution cannot be forcibly sent back to Bangladesh as they may be killed there and thus would be deprived of their right under Art.21 of the Constitution.

**Freedom from torture**

Art.7 of ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Instances of cruel, inhuman or degrading treatment and complaints alleging State failure to prevent or punish rape and serious sexual assaults have been brought before the Human Rights Committee under this provision. In the case of Cyprus v. Turkey, 4 EHRR 482 (1982), the European Commission of Human Rights found that Turkey had violated its obligation to prevent and punish inhuman or degrading treatment under Art. 3 as a result of the rapes committed by Turkish troops against Cypriot women. In the Aydin case, the European Court found that rape of a detainee by an official of the State "must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim. Furthermore, rape leaves deep psychological scars on the victim that does not respond to the passage of time as quickly as other forms of physical and mental violence". Under the African Charter on Human and Peoples' Rights, rape and other serious sexual assaults come within the ambit of Art. 4 and Art 5, viewed as violations of the right to respect for the integrity of the person (Art.4), and as forms of cruel, inhuman and degrading treatment, prohibited under Art.5. The Inter-American Convention on Human Rights enshrines

\textsuperscript{248} Chairman Railway Board v. Chandrima Das, AIR 2000 SC 988.
the right to humane treatment in Art. 5, under which "every person has the right to have his physical, mental and moral integrity respected" and "no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."

Article 7 is an absolute, non-derogable right. It cannot be modified or relaxed in light of extenuating circumstances. For example, in *Mukong v Cameroon*, the HRC rejected an attempt by the State Party to justify appalling prison conditions on the basis of economic and budgetary problems. Further, notions of proportionality are not relevant to an assessment of whether treatment breaches Art. 7.

While the HRC has dealt with most cases regarding poor general conditions of detention under art 10(1) of the ICCPR, a number of cases have found breaches of Art. 7 on the basis of oppressive conditions of incarceration, including:

(a) *Deidrick v Jamaica*, where the applicant was locked up in his cell 23 hours a day, without mattress or bedding, integral sanitation, natural light, recreational facilities, decent food, or adequate medical care; and

(b) *Young v Jamaica*, where the applicant had been detained in a tiny cell, allowed few visitors, assaulted by prison wardens, had his effects stolen and his bed repeatedly soaked.

In a series of determinations, the HRC has also recognised that mental distress and deterioration caused by detention may constitute a breach of Art. 7, particularly where there is inadequate health care available in the prison:

a. In *Massera v Uruguay*, the HRC found that detention in conditions detrimental to a Person's health constituted a breach of Art. 7;

---

249 HRC, General Comment No. 20 (Replaces General Comment No. 7), on prohibition of torture and cruel treatment or punishment (2001)[3]
b. In Williams v Jamaica, the HRC concluded that inadequate medical treatment for a mental health condition while detained on death row constituted a violation of Art. 7;

c. In Setelich / Sendic v Uruguay, HRC considered that the denial of medical treatment required by a prisoner for his medical condition disclosed a violation of Art. 7; and

d. In C v Australia, the applicant was an asylum seeker who was being held in detention while his immigration status was being determined. He was detained for over two years, and claimed that the lengthy period caused him to develop a serious mental illness. The HRC stated that the continued detention of the author when the State party was aware of the author’s mental condition and failed to take steps necessary to ameliorate the author’s mental deterioration constituted a breach of Art.7.

Freedom from torture is not mentioned explicitly as a fundamental right in the Constitution of India. However the Apex Court has held that freedom from torture is implicit in Art.21 pertaining to right to life.

In Kishore Singh v State of Rajasthan, The Supreme Court held that the use of “third degree” method by the police is violative of Art. 21 and directed the State to take necessary steps to sensitize the police force so as to inculcate a respect for the human person. The court also held that long spells of solitary confinement on flimsy grounds like “loitering in the prison”, “behaving insolently” must be regarded as barbarous and against human dignity and therefore violative of Articles 21, 19 and 14 of the constitution. The Prisons Act and Prison Rules are to be in conformity with Art. 21.” “Human dignity is a clear value of our Constitution not to be bartered away for mere apprehension entertained by jail officials” declared Krishna Iyer, J. Similarly

254 HRC, Communication No R 1/5, 15 August 1979.
256 HRC, Communication No 63/1979, UN Doc CCPR/C/OP/1 (1985), [20].
258 Kishore Singh v State of Rajasthan AIR 1981 SC625
torture and ill-treatment of women suspects in police lockups has been held to be violative of Art.21 of the Constitution and in Sheela Barse the Court gave detailed instruction to the concerned authorities in this regard.259

The Second World War (1939-45) in its aftermath, gave rise to an intense concern about the use of human subjects for medical research as revealed by the shocking details of the trial of German medical practitioners accused of conducting experiments on human subjects without their consent and exposing them to grave risk of death or permanent impairment of their faculties.

Thus, the first International Statement on the ethics of medical research using human subjects namely, the Nuremberg Code was formulated in 1947, which emphasized consent and voluntariness. In 1948, Universal Declaration of Human Rights (adopted by the General Assembly of the United Nations) expressed concern about human beings being subjected to involuntary maltreatment. In 1966, the International Covenant on Civil and Political Rights specifically stated, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his consent to medical or scientific treatment.'(Art.7)

Usually the human beings used for experimental purposes were—and are— the disenfranchised, populations of prisoners, orphans, the mentally retarded, charity patients of all kinds. A distressing feature of many of these experiments is the fact that the men and women upon whom they are performed are often not only ignorant, but under constraint.

The Nuremberg trials brought to light the horrors of medical experimentation on human beings, and tried to articulate a restraining formula by stressing the concept of "informed consent," but the trials also recognized that "Medical science cannot,

---

259 Sheela Barse v Sate of Maharashtra, 91983) 2 SCC 96
260 'Informed consent' facilitates making 'free consent' based on a rational judgment. It is a process in which a person learns key facts about a clinical trial, including potential risks and benefits, before deciding whether or not to participate in a study. Informed consent continues throughout the trial. Except in the case of an emergency, a doctor must obtain a patient's agreement (informed consent) to any course of treatment. Doctors are required to tell the patient anything that would substantially affect
unless it is to be brought to a standstill, dispense with the application in suitable cases of new remedies and procedures not yet fully tested. Nor can it do entirely without scientific experiment on human beings itself."

In India 'consent' has been defined in the Indian Contract Act as 'understanding the same thing in the same sense' while 'free consent' has been defined in the Indian Contract Act as consent that is not marred by coercion, undue influence, fraud or misrepresentation (S.14). Informed consent' facilitates making 'free consent' based on a rational judgment.

The Indian Council for Medical Research has recognised the need for a uniform and universally recognised ethical guideline for research on human subjects and brought out in February 1980, a document entitled 'Policy statement on ethical considerations involved in research on human subjects' prepared by the ethical committee under the chairmanship of Honorable Justice Shri H.R. Khanna. To update this document further a Central Ethics Committee on Human Research (CECHR) was constituted under the chairmanship of Honourable Justice Shri M.N. Venkatachaliah to consider various issues related to the Ethical, Legal and Social dimensions of research involving human subjects. The committee first met on 10th September, 1996 and identified following major areas and set up sub-committees of experts for drawing up a set of guidelines:

1. Clinical evaluation of Drugs/Devices/Diagnostics/Vaccines/Herbal remedies
2. Epidemiological research
3. Human Genetics research
4. Transplantation research, including fetal tissue transplantation
5. Assisted Reproductive Technologies

The patient's decision. Such information typically includes the nature and purpose of the treatment, its risks and consequences and alternative courses of treatment. However the concept of "informed consent" has led to the duplicitous practice of what Bradford H. Gray calls in his book, *Human Subjects in Medical Experimentations*, "the engineering of consent." His study unsurprisingly reveals that "informed consent" is often a mirage, often coerced from frightened people who are in too much pain and confusion to withstand a request from a doctor.
However, presently\textsuperscript{261} most research institutions in India either do not have an Institutional Ethics Committee and where there is one, has inadequate representation in it by persons other than those of the medical fraternity\textsuperscript{262} despite the clinical research guidelines that specify the need for such personnel\textsuperscript{263}. Further, out of the tens of thousands of doctors in India, only a handful of around 400 to 500 are GCP trained and experienced in conducting clinical trials. A major investment is required at the beginning of the trial to train medical professionals in the basics of GCP and GLP\textsuperscript{264} given that India is now viewed as a preferred destination for outsourcing clinical trials\textsuperscript{265} since costs can be cut by nearly 60%! There are currently over 10,000 volunteers across the country testing around 350 drugs; up from 250 trials in 2004\textsuperscript{266}. Earlier, trials could be done in India only after completion of one phase of testing abroad but the recent amendment of Schedule Y of the Drugs and Cosmetics Act has since permitted ‘same phase trials’ and the local clinical research market, ‘is swamped with requests for more and more trials being outsourced to India’. This raises concern whether more Indians would become guinea pigs\textsuperscript{267} for what is perceived as the benefits of the western world. India’s huge population base, the large pool of patients she offers (she is currently the world’s diabetes capital and has the highest number of cancer patients), her being home to a wide variety of diseases ranging from tropical infections to degenerative diseases, the high patient-doctor ratio,

\textsuperscript{261} As on March 2007
\textsuperscript{262} A survey by ICMR shows that there are ethics committees in only about 200 institutions. Refer Nundy S. and Gulhati CM. A New Colonialism? — Conducting Clinical Trials in India. \textit{NEJM}. April 21, 2005. No. 16, Volume 352: 1633-1636. Also see Natasha Das article titled Outsourcing Clinical Trials to India in \textit{chillibreeze}, February 2007
\textsuperscript{263} It is feared that without a representation of persons from a non-scientific background, the opinion of the IEC is likely to be biased in favor of clinical trials and research.
\textsuperscript{264} Good Clinical Practice (GCP) and Good Laboratory Practice (GLP)
\textsuperscript{265} According to Dr Umakanta Sahoo who heads the Indian operations of Chiltern International, “Cost-effectiveness, competition and the increased confidence on capabilities and skill sets have propelled many global pharmaceutical players (Pfizer, Novartis, Astra Zeneca, Eli Lilly, GSK, Aventis, Novo Nordisk to name but a few) to expand their own clinical research investment and infrastructure in India” and adds that the amendment of Schedule Y (2005), is a step towards harmonizing the Indian regulatory framework with international Good Clinical Practice (GCP) for all the stakeholders in clinical research including the sponsors, CROs, Site Management Organisations (SMOs), Institutional Ethics Committees (IECs), Investigators and the subjects participating in clinical trials in India. 
\textsuperscript{266} For more see “For a few guineas” by Debarshi Dasgupta, OUTLOOK, March 2007.
\textsuperscript{267} “Indian women can not be used as guinea pigs...” remarked Justice A.S. Anand, when he pronounced the landmark judgment in 1998 banning the use and sale of Quinacrine for female sterilisation owing to the potential dangers of this method, ranging from pelvic infections to the possible perforation of the uterine wall and concerned by the unethical approach to the recruitment of subjects in such clinical trials.
her large pool of highly qualified and dedicated scientists and clinical research professionals, her prowess in information technology, having English as the primary language of education and communication among Indians and more importantly the pro-government attitude are all important factors that weigh in India’s favour in being ranked as a preferred destination for clinical trials.

The clinical research industry in India according to a recent McKinsey report is expected to garner $1-1.5 billion in revenues by 2010\textsuperscript{268}. Recognizing the inevitability of clinical trials and the phenomenal growth expected in this sphere of industry steps must be taken to expedite the passing of the Bill that makes mandatory the merely advisory ICMR ethical guidelines for good clinical practices and more importantly declare that when clinical drug trial are conducted without informed consent, such unethical actions would tantamount to ‘torture’ and constitute a violation of the right to life enshrined in Article 21 of the Constitution of India.

Prohibition of Slavery and Slave trade

The 1926 Slavery Convention, an initiative of the League of Nations, was a turning point in banning global slavery. Article 4 of the Universal Declaration of Human Rights, explicitly bans slavery. The United Nations 1956 Supplementary Convention on the Abolition of Slavery was convened to outlaw and ban slavery worldwide, including child slavery. Article 8 of ICCPR prohibits slavery and slave trade in all their forms. Further Art.8 (3) states that no one shall be required to perform forced or compulsory labour subject to the proviso stated in Article 3 (b) and (c)\textsuperscript{269};

\textsuperscript{268} From a negligible share in the late nineties, the market grew to $70 million in 2002. For more see Business Today Report \textit{www.india-today.com/btoday/netexcl/net20061128/5.html}

\textsuperscript{269} 3. (a) No one shall be required to perform forced or compulsory labour;
(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
Slavery refers to the state of one bound in servitude as the property of a slaveholder or household. The Slavery Convention (Article 1.1) in 1926 defined slavery as "...the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised...."

According to the United Nations, 4 million people a year are traded against their will to work in a form of servitude. The majority of them come from Southeast Asia, Eastern Europe and Latin America. According to Kevin Bales, one of the world's leading experts on contemporary slavery, "people are enslaved by violence and held against their wills for purposes of exploitation." While people today most likely believe that slavery is a thing of the past, the practice is still thriving wherever poverty, social conditions, and gullibility can be exploited. Bale estimates that there are 27 million slaves in the world today. Bonded labour, trafficking in women and children, gross abuse of domestic workers, prison labour, forced and compulsory labour in public construction projects, and forced recruitment of children into the armed forces are all examples of modern forms of slavery.

Servitude encompasses a state of subjection to an owner or master and is characterised by lack of personal freedom, to act as one chooses. Servitude may arise from conscription, imprisonment or indentured and involuntary labour. Art. 1 of the UDHR, states that all human beings are born free and equal in dignity and rights. The provision against servitude in the Indian Constitution is found in Article 23 which reads as follows-

23. Prohibition of traffic in human beings and forced labour.—(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(ii) Any service of a military character and, in countries where conscientious Objection is recognized, any national service required by law of conscientious objectors;
(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
(iv) Any work or service which forms part of normal civil obligations.

270 Kevin Bales, Disposable People: New Slavery in the Global Economy, University of California Press, 1999
The term ‘beggar’ refers to involuntary work without payment. In *Peoples Union for Democratic Rights v Union of India*\(^{271}\), the Supreme Court considered the scope and ambit of Art.23 in detail and holding that the non payment of minimum wages to the workers employed in various Asiad Projects in Delhi was a denial to them of their right to livelihood the Court added that ‘this Article strikes at forced labour in whatever form it may manifest in’.

In *Bandhua Mukti Morcha v Union of India*\(^{272}\) the Apex Court emphasised the need to rehabilitate released bonded labourers.

In *Sanjit Roy v State of Rajasthan*\(^{273}\) the Court ruled that payment of wages to workers employed in Famine Relief Work below minimum wages constituted bonded labour.

In *Deena v Union of India*\(^{274}\) it was held that labour extracted from prisoners without paying proper remuneration was “forced labour” and violative of Art.23 of the Constitution.

Further in India, Parliament enacted the Suppression of Immoral Traffic in Women and Girls Act of 1956(SITA) which was subsequently amended as The Immoral Traffic (Prevention) Act (PITA) with the object of inhibiting and abolishing immoral trafficking in women and children.

In *Gaurav Jain v Union of India* the Supreme Court in response to the PIL filed before it issued several directives relating to the rehabilitation of child prostitutes and the children of prostitutes.

Though Para. 3(a) of Art.8 of ICCPR prohibits forced or compulsory labour, Para. 3(b) states that in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court shall not come within the ambit

\(^{271}\) AIR 1982 SC 1943, AIR 1982 SC 1473
\(^{272}\) AIR 1984 SC 802
\(^{273}\) AIR 1983 SC 328
\(^{274}\) Air 1983 sc 1155
of Art. 8 (3) (a). Imprisonment with hard labour, also known as rigorous imprisonment is recognised by S.60 of IPC.

Other exceptions included in Art.8 of ICCPR are service of a military character and, in countries where Conscientious Objection is recognized, any national service required by law of conscientious objectors; service exacted in cases of emergency or calamity threatening the life or well-being of the community besides any work or service which forms part of normal civil obligations.

In India, Chapter IV-A of the Constitution dealing with Fundamental Duties state in Art.51 (d) that "it shall be the duty of every citizen of India to defend the country and render national service when called to do so". This provision is in consonance with the recognised exception contained in ICCPR.

The call to defend the country or to exact services in a calamity or life threatening situation is normally resorted to by a State during the imposition of public emergency following war, external aggression or internal disturbance. This principle is universally recognised.

Art.20 and 21 of the Constitution are in India the presently recognised non-derogable provisions during a public emergency. Since slavery and slave trade impinge on the dignity of an Individual and since the Apex Court has recognised that right to life includes the right to live with dignity it can well be construed that protection against slavery and slave trade is afforded to all peoples in India in a public emergency.

**Imprisonment of a Contractual Debtor**

Art.11 of ICCPR states, "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation".

In India, there is no specific reference to protection of a judgment debtor in PART III of the Constitution. Therefore it does not constitute a Fundamental Right.

275 See also Francis Coralie v Union Territory of Delhi, AIR 1978 SC 597 and PUDR V Union of India, air 1982 sc 1473.
Besides at the time of ratifying the ICCPR the Indian Government had expressed its reservation with respect to the provisions of Art.1, Article 9(5) and Article 11 of the ICCPR.

Further, Section 51 of the Civil Procedure Code in India allows the imprisonment of a judgment debtor as an alternative remedy. In *Jolly George Verghese v Bank of Cochin* it was argued before Court that S.51(c) should be struck down because it violated Art.11 of ICCPR which India had ratified. Rejecting this contention Justice Krishna Iyer ruled that mere ratification of International treaties will not make them per se enforceable in Municipal Law unless the Parliament took steps to amend the domestic laws in the light of the obligations arising from an International treaty.

In *Jolly George Varghese v. Bank of Cochin*, the Supreme Court held that in case of conflict between a provision of an International Treaty such as Article 11 of the International Covenant on Civil and Political Rights to which India is a party and a provision of a State statute such as Section 51 (Proviso) and Order XXI, Rule 37, Civil Procedure Code, it is the latter which shall prevail, if the International Treaty in question has neither been specifically adopted in the municipal law nor has undergone transformation. Krishna Iyer J who delivered the judgment further observed:

"The remedy for breaches of International Law in general is not to be found in the law courts of the State because International law *per se or proprio vigore* has not the force of law or authority of civil law till under its inspirational act actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets a common standard of achievement for all people and all nations but cannot create a binding set of rules. Member states may seek through appropriate agencies to initiate action when these basic rights are violated but individual citizens cannot complain about their breach in municipal courts even if the country concerned has adopted the covenants and ratified the Operational Protocol. The individual cannot come to the court but may complain to the Human Rights Committee which in turn will set in motion other procedures. In short the basic rights enshrined in the International Covenants may at best inform judicial institutions and inspire legislative action with

---

member States, but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority." 277

Further his lordship pointed out that "the positive commitment of State Parties ignites legislative action at home but does not automatically make the Covenant an enforceable part of the corpus juris of India." 278

The researcher submits that this case reveals how the 'Doctrine of Specific Adoption' was applied by the Supreme Court in dealing with India's obligation under ICCPR.

It is, however, significant to note that Krishna Iyer J construed the said Section 51 of the Civil Procedure Code in such a way as to avoid conflict with Article 11 of the International Covenant on Civil and Political Rights, 1966. He observed: that 'to be poor is no crime' and stated that "Article 11 of the International Covenant on Civil and Political Rights only interdicts imprisonment it that is sought solely on the ground of inability to fulfill the obligation. Section 51 of the Civil Procedure Code also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Section 51 of the Code, but this does not violate the mandate of Article 11 of the Covenant on Civil and Political Rights. However, if he once had the means but now has not or if he has the money now on which there are other pressing claims, it is violative of the spirit of Article 11 of the Covenant to arrest and confine him to jail so as to coerce him into payment". Thus the researcher takes the view that though the Civil Procedure Code in India also authorizes detention of a judgment debtor, the content and sweep of Sec.51 of C.P.C is wide enough to declares that if the debtor has no means to pay he cannot be arrested and detained. 279 The same position accrues in India even during a public emergency. It must also be stated here that when the Indian Government acceded to the ICCPR, India had expressed her reservation with respect to Art.11 of the ICCPR. However it must be noted that Art.5 of ICCPR states clearly that no State

277 ibid at p.474
278 ibid
279 Refer Proviso and Explanation attached to S.51 of C.P.C.
Party to the Covenant can curtail the rights contained in the said covenant. Further Art.51 provides the *modus operandi* for carrying out any amendment to the provisions of the ICCPR. As such the legal efficacy of the reservation expressed by India is questionable.

**Protection against ex-post facto laws:**

An *ex post facto law*\(^{280}\) is a law which imposes penalties retroactively or which increases the penalty for the past acts.\(^{281}\) It is a law that retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law\(^{282}\). Article 15 of ICCPR provides for protection against ex-post facto laws. The corresponding provision in the UDHR is found in Para 2 of Article 11\(^{283}\). In India Clause (1) of Art 20 says that - No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Art.20 (1) has two parts. Under the first part, no person is to be convicted of an offence except for violating a 'law in force' at the time of commission of the act charged as an offence. A law enacted later, making an act done earlier (not an offence when done) as an offence, will not make the person liable for being convicted under it.\(^{284}\) Immunity is thus provided to a person from being tried for an act, under a law enacted subsequently, which makes the act unlawful.\(^{285}\) This means that if an act is

---

\(^{280}\) Derived from Latin, meaning "from something done afterward"

\(^{281}\) CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY, 78 (1958)

\(^{282}\) A law may have an *ex post facto* effect without being technically ex post facto. For example, when a law repeals a previous law, the repealed legislation no longer applies to the situations it once did, even if such situations arose before the law was repealed. The principle of prohibiting the continued application of these kinds of laws is also known as *Nullum crimen, nulla poena sine praevia lege poenali*.

\(^{283}\) “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

\(^{284}\) Kanaiyalal v. Indumati, AIR 1958 SC 444 : 1958 SCR 1394

\(^{285}\) State of Maharashtra v. KK Subramaniam Ramaswamy, AIR 1977 SC 2091 : (1977) 3 SCC 525
not an offence on the date of its commission, a law enacted in future cannot make it so.286

The second part of Art.20 (1) immunizes a person from a penalty greater than what he might have incurred at the time of his committing the offence. Thus, a person cannot be made to suffer more by an ex-post-facto law than what he would be subjected to at the time he committed the offence.287

In India Art.20 (1) does not bar a civil liability being imposed retrospectively. Similarly, a tax can be imposed retrospectively.288

What is prohibited under Art.20 (1) is only conviction or sentence, but not trial, under an ex-post-facto law.289 The objection does not apply to a change of procedure or of court. A trial under a procedure different from what obtained at the time of the commission of the offence, or by a court different from that which had competence at the time cannot ipso facto be held unconstitutional. A person being accused of having committed an offence has not Fundamental Right of being tried by a particular court or procedure, except in so far as any constitutional objection by way of discrimination or violation of any other Fundamental Right may be involved.

All the same an accused can take advantage of the beneficial provisions of the ex post facto law for the rule of beneficial construction requires that ex post facto law should be applied to mitigate the rigours of the previous law on the same subject. This proposition is well illustrated by Rattan Lal v. State of Punjab290 the facts of which are as follows-

A boy of 16 years of age was found guilty of an offence and was awarded a rigorous imprisonment of six months and also imposed a fine on 31.5.1962. His appeal was dismissed by the Sessions judge on 22.9.62 and by the High Court on 27.9.62. The Probation of Offenders Act came into force on 1.9.62. No plea was taken

289 Under the American law the prohibition applies even in respect of a trial making the guarantee even wider.
290 AIR 1965 SC 444 : (1964) 7 SCR 676
before the High Court that the boy should be given the benefit of the said Act. Later, the petitioner filed an appeal in the Supreme Court by special leave and prayed that he be given the benefit of the Probation of Offenders Act. The Government argued, on the other hand, that the Act is not retrospective and the offence was committed much before the Act came in force. But the Supreme Court disagreed with the Government’s contention. The Court observed: ‘an ex-post-facto law which only mollifies the rigour of a criminal law does not fall within the said prohibition [i.e., of Art.20 (1)]. If a particular law makes a provision to that effect, though retrospective in operation, it will be valid.’

The impact of ex post facto laws was considered by the Apex Court in Sarla Mudgal v. Union of India. Interpreting S.494, IPC, the Supreme Court ruled in 1995 in the instant case that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved according to law would be invalid and the husband would be guilty of the offence under s.494, IPC.

It was later argued in Lily Thomas v. Union of India that the law declared by the Supreme Court in Sarla Mudgal could not be given retrospective effect because of Art.20 (1); it was argued that the decision ought to be given only prospective operation so that the ruling could not be applied to a person who had already solemnized the second marriage prior to the date of the Sarla Mudgal judgment.

The Supreme Court rejected this contention and declared that it had not laid down any new law in Sarla Mudgal. What the Court did in that case was only to interpret the law which had always been in existence. It is the settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because the Court does not legislate but only interprets an existing law.

It must be noted that the scope of Art. 11 Para 2 of the UDHR and Art.15 of the ICCPR implies universal application while Art. 20 (1) of the Indian Constitution

covers merely national laws. However the content of Art.20 is wider and encompasses protection against double jeopardy and self incrimination as well. The UDHR does not make any specific reference to the protection against double jeopardy or protection against self incrimination for that matter. Such protection has to be inferred from the latter part of Art.11 Para 1 which states that ‘Everyone charged with a penal offence has to be accorded with ‘all the guarantees necessary for his defence’.

In ICCPR protection against double jeopardy and self incrimination are contained in Art.14 (7) and Art. 14(3)(g) respectively. The discernable factor here is that Art.14 is not considered to be a non-derogable provision under ICCPR in accordance with Art.4 of the said Covenant.

However presently in India, Art. 20 which encompasses protection against ex post facto laws in Clause1 and protection against double jeopardy and self incrimination in Clause 2 and 3 respectively are Fundamental Rights that are non derogable even during a public emergency. This is the prevailing legal position in India since the passing of the Forty- fourth Amendment Act to the Constitution in 1978. Art 359 (1) now reads as follows- "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 (except articles 20 and 21) 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”.

The aforesaid provisions indicate that in India, presently, greater human rights protection is being accorded to the protection against double jeopardy and protection against self incrimination by equating these rights to the position of non-derogable rights. In this connection it is pertinent to note that Art.5 clause 2 of the ICCPR states that “There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent".
Right to be treated as a person before the law

Art. 6 of the UDHR states that “Everyone shall have a right to recognition everywhere as a person before the law”.

The same provision is reiterated in Art. 16 of ICCPR which uses identical language.

Reference to ‘persons’ in the UDHR is made by frequent reference to terms like ‘everyone has the right............’ or ‘No one shall be subjected to.......’.

Both the UDHR and ICCPR by making a reference to the word ‘persons’ seeks to protect the rights of both national and non nationals in countries. In India some of the Fundamental Rights contained in PART III of the Constitution accrue only to citizens. However, Article 20 and Article 21 protect all ‘persons’ and the rights contained in these Articles are non derogable.

Interestingly neither the UDHR nor ICCPR or The Constitution of India for that matter has defined the meaning of the term ‘person’. Courts in India have interpreted the meaning of the term ‘person’ to cover both ‘natural persons’ and ‘artificial persons or juristic persons’ for the sake of according protection under Art. 14 covering the right to equality. Thus a joint stock Company in India can claim protection under Art. 14 being an artificial person recognised by law. What is more the Apex Court has upheld preferential treatment meted out to Public Sector Undertakings and State cooperative Societies and has held that such favourable treatment is not discriminatory on the ground of the doctrine of reasonable

293 By way of explanation, Art. 2 of the UDHR states that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”. Thus the intention of the UDHR is to accord protection to all persons without discrimination of any kind more fully described in Art.2 of the Declaration.
294 Refer Hindusthan Paper Corporation v Govt. of Kerala, AIR 1986 SC 1541
295 Sarkari Sasta Anaj Vikreta Sangh, Tahasil Bemetra v Madhya Pradesh, AIR 1981 SC 2030
classification. However the reference to the term 'person' in Art.20 and in Art.21 is construed to be confined to natural persons alone.

A grave matter of concern is that neither the UDHR nor the ICCPR expressly protect the rights of an unborn child or 'a child in utero'. The rights of the unborn were discussed in the drafting stages of the Universal Declaration of Human Rights 1948 as well as in the drafting stages of the ICCPR and CRC. However even the Convention on the Rights of the Child while defining 'child'\(^{296}\) did not expressly refer to a child in the womb. The CRC while recognizing that every child has the inherent right to life enjoins State parties "to ensure to the maximum extent possible the survival and development of the child."\(^{297}\)

**Freedom of thought, conscience and religion:** Article 18 of ICCPR recognizes the right to freedom of thought, conscience and religion.\(^{298}\) Art.18 (2) provides protection against coercion when it impairs the freedom to have or to adopt a religion or belief of one's choice while Art.18 (3) provides for the limitations to this right in the interest of public safety, order, health, or morals or the fundamental rights and freedoms of others. Art 18(4) exhorts State parties to respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. While Art.18 (1) of the ICCPR is a true reflection of Art 18 of the UDHR, Clauses2, 3 and 4 of the ICCPR elaborate on this right.

In India the right to freedom of religion is protected in PART III of the Constitution under Articles 25-28.\(^{299}\)

The provisions of Art.25 (1) of the Indian Constitution correspond to Art.18 (1) and Art.18 (2) of ICCPR.

\(^{296}\) Art.1 of the CRC states that "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

\(^{297}\) Refer Art.6 (2) of CRC.

\(^{298}\) Art18(1) further states that this right includes the freedom to have or to adopt a religion or belief of ones choice, and freedom, either individually or in community with others and in public or private, to manifest ones religion or belief in worship, observance, practice and teaching.

\(^{299}\) Refer Annexure VIII C (pages lxiv-lxvi) for the full text of Articles 25-28 of the Indian Constitution
Public safety, order, health, or morals or the fundamental rights and freedoms of others score over the right to freedom of religion and underlines the limitations to this right in Art.18(3) of ICCPR and further corresponds to the opening words of Art.25(1) and to Art.25(2) of the Indian Constitution. In *Church of God (full Gospel) in India v KKMC Welfare Association* a question was raised that whether a community can claim right to use microphones and loudspeakers for reciting prayer. It was answered in negative “no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums”, with the Court ruling that “in a civilized society in the name of religion, activities which disturb old or infirm persons, students, or children having their sleep in the early hours or during day time or other persons carrying on other activities cannot be permitted.

Further, under Art.25 (2) of the Constitution of India, the State is authorized to make law –

(i) For regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and

(ii) For providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Art.26 of the Indian Constitution permits every religious denomination the freedom to manage their religious affairs subject to public order, morality and health. In 1986, a two Judge Bench of the Supreme Court ruled in *Bijoe Emmanuel V State of Kerala, * that Jehovah’s Witness constitute a religious denomination and after referring to a number of foreign judgments set aside the expulsion order of three students in a school holding that compelling these students to sing the National

---

300 AIR 2000 SC 2773
301 *Bijoe Emmanuel V State of Kerala* (1986) 3 SCC 615: AIR 1987 SC 748
302 *West Virginia State Board of Education v Barnette,* 319 US 624; *Donald v Board of Education for the City Hamilton,* 1945 Ontario Reports,518.
Anthem despite their “genuine, conscientious religious objection” would contravene the rights guaranteed by Art.19 (1) (a) and Art 25(1).

Expression “matters of religion” includes all matters pertaining to religion such as rituals, ceremonies and mode of worship. All matters and practices which form integral part of a religion are included within the term of “matters of religion”. Such matters as offering food to the idol, daily recital of sacred texts, offerings of food, flower and money to the deity by the devotees form the integral part of the religion, thus, come within the meaning of “matters of religion”. Apart from such matters which form an integral part of religion, all secular matters, though associated with religious institutions, may be regulated by State. It was held in *Sri Jagannath Temple Puri Management Committee v. Chintamani*, that cleaning of the temple, including the collection of monies lying scattered all over the temple floor and also from the throne cannot be treated as performance of any religious rites. On the contrary, it is an act of pure and simple collection of money for which a prescribed portion is given to those who collect the money. It is nothing but a way of remunerating the sewaks for the job done.

Art. 27 of the Indian Constitution upholds the principle of ‘secularism’ and states that “No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination”. This provision however does not invalidate the levy of a fee on pilgrims to meet the expenses of measures taken to safeguard the health, safety and welfare of the pilgrims and is not invalid under Art.25 (1) of the Constitution which permits legislation for promoting health, morality and public order.

Art.28 does not allow religious instruction to be imparted in any educational institution wholly maintained out of State funds. Never the less the study of religious philosophy and culture, have been upheld by the Apex Court on numerous occasions,

---

304 *Sri Jagannath Temple Puri Management Committee v. Chintamani*, AIR 1997 SC 3839
landmark judgments being D.A.V. College, Jullender v State of Punjab,\(^{305}\) and Aruna Roy V Union of India\(^{306}\) with the Court observing that Art. 28 does not ban a study of religions.

Further in consonance with the respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions, enshrined in Art. 18(4) of ICCPR, Art. 28(3) of the Indian Constitution also provides that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

The point of departure between the ICCPR and The Indian Constitution is that Art. 18 is a non derogable provision under the ICCPR, implying that they hold good even in times of a public emergency while in India though the right to freedom of religion is a fundamental right applicable to all persons and not merely citizens, these rights are liable to be suspended in times of a public emergency. As stated earlier Article 359 empowers the President to suspend the right to seek legal redress for enforcement of rights conferred by Part III of the Constitution except Article 20 and 21 (vide Forty Fourth Amendment). Both Art. 358 and Art. 359 were modified by the Forty-fourth Amendment Act wherein the current legal position is that pursuant to the amendment of Art. 358(1), the State can make any laws and take executive action which may but for the proclamation of emergency declared because the security of India or any part of the territory thereof is threatened by war or by external aggression be in breach of the rights contained in Art. 19. It may be noted that the Amendment ensures that Art. 19 will not be suspended if the Proclamation of Emergency is made on the ground of the threat to the security of the nation caused by armed rebellion. Another saving grace is that a new clause (2) to Art. 358 now provides that nothing in clause (1) shall apply—


to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made; or

(b) to any executive action taken otherwise than under a law containing such a recital.

Under Art.359 however the right to move any court for the enforcement of such of any of the rights conferred by Part III save Articles 20 and 21 remain suspended pending the Presidential proclamation of emergency.

The point of convergence between Articles 358 and 359 is that the laws impacted by both these Articles should have a specific recital to the effect that these laws have been made in the context of the emergency. Thus the domestic laws will not be affected unless these laws have been made in the context of the emergency and contain a specific recital to that effect. This means that the validity of a law which is not in any way connected with the emergency can be challenged even during the proclamation of the emergency.

In times of peace the infringement of any of the provisions contained in Art25-28 will entitle an aggrieved person to file a writ petition to uphold the fundamental right to religion. The Constitutional remedies are contained in Art.32 and Art 226. The former allows aggrieved parties to approach the Apex Court for redress while Art.226 provides for writ jurisdiction in the High Court.

EMERGENCY PROVISIONS IN THE CONSTITUTION OF INDIA

A notable feature of The Indian Constitution is the way in which the normal peace-time federalism can be adapted to an emergency situation. The framers of the Constitution felt that, in an emergency, the Centre should have overriding powers to control and direct all aspects of administration and legislation throughout the country. The Emergency provisions in the Indian Constitution are enshrined in PART XVIII of
The Constitution comprising Art 352 to Art.360\(^{307}\). The Articles outside Part XVIII which concerns emergency are Art. 83 (2), Art.250 and Articles 268 to 279\(^{308}\).

**The Constitution envisages three types of emergencies:**

i) Emergency arising from a threat to the security of India (Articles 352, 353, 354, 358 and 359);

ii) Emergency in a State due to failure or break down of its constitutional machinery (Articles 356 and 357)

iii) Financial Emergency (Article 360)

Article 352, which deals with the proclamation of emergency arising from a threat to the security of India underwent substantial alteration through the Forty-second Amendment, 1976 and Forty-fourth Amendment, 1978. The Forty-second Amendment came in the wake of the June 1975 emergency declared to meet 'Internal Disturbance' by the government of Indira Gandhi. The Forty-fourth Amendment was introduced at the initiative of the Janata government which was installed after the 1977 elections. The major restructuring of Article 352 was in short a sequel to an unprecedented series of repressive measures introduced by the Congress government in 1975, 'ushering in emergency as a system of governance rather than invocation of constitutional emergency powers'. The original article provided for a Presidential Proclamation in circumstances of grave emergency threatening the security of India or

---

\(^{307}\) Refer Annexure VIII H for the full text of PART XVIII of the Constitution of India.

\(^{308}\) The proviso to **Article 83(2)** enables the extension of the life of the Lok Sabha during the operation of an emergency by a period not exceeding one year at a time and not beyond six months after the cessation of the emergency. While this has been done, the Constitution is silent on the extension of the period of six months between two consecutive sessions of Parliament, as in Article 85. What happens if an emergency arises during the period when one Lok Sabha has been dissolved and the subsequent one has yet to be constituted? The emergency may be such that the conduct of elections to the Lok Sabha may itself become difficult, making it necessary to extend the obligatory six-month period between two sessions of Parliament. **Article 250** empowers Parliament to legislate on the State List during an emergency, which together with Articles 353 and 354, impact on the federal structure pending a proclamation of emergency. Article 353 enables the executive power of the Union to make inroads into state turf. The Forty-second Amendment introduced a proviso to this article through which the executive powers of the Union and the legislative powers of Parliament could be extended even to territories other than those in which the emergency may be in operation opening up scope for misuse of this special provision. It is a matter of concern that the far-reaching nature of this proviso escaped the attention of the Forty-fourth Amendment. Article 354 provides for modifications of the scheme of distribution of revenues delineated in Articles 268 to 279 during an emergency.
any part of its territory, due to (1) war, (2) external aggression, and (3) internal disturbance or imminent danger of this. The third prerequisite of 'internal disturbance' was deleted and replaced with the words 'armed rebellion' by the Forty-fourth Amendment.

Interestingly, the words 'internal disturbance' were retained undisturbed in Article 355 which declares that it is the duty of the Union to protect every state against external aggression and internal disturbance. In order to fulfill this obligation, the Union in the event of external aggression can resort to a proclamation of emergency to protect the State from external aggression but to contain an internal disturbance; it can only resort to its non-emergency powers consequent to the forty-fourth amendment.

By deleting 'internal disturbance' and introducing elaborate checks and balances, the prospect of the misuse of emergency power was no doubt sought to be curtailed. However the researcher submits that these amendments unwittingly led to a self inflicted emasculation of the powers of the Union in discharging the duty cast upon it under Article 355,\(^{309}\) namely to protect every state against internal disturbance. Presently the Union has to meet the challenge of quelling internal disturbance without resort to emergency provisions.

The piquant situation resulting from the deletion of the words ‘internal disturbance’ by the Forty-fourth Amendment, which deprived the government of resort to emergency powers to quell internal disturbance, for instance became obvious in the backdrop of the widespread terrorism in Punjab, resulting in the insertion of a new Art.359-A into the Constitution by virtue of the fifty-ninth Amendment Act to the Constitution in 1988. The statement of objects and reasons to the Fifty-ninth Amendment mentioned that

\(^{309}\) Article 355 reads as follows.- Duty of the Union to protect States against external aggression and internal disturbance.—It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.
It may be necessary to invoke the provisions of Article 352 of the Constitution to declare a partial Emergency either in the whole of the State of Punjab or in particular districts of the State. If such a situation arises, the expression 'armed rebellion' included in that Article as one of the grounds for declaration of Emergency (which alone could be resorted to in the case of an internal Emergency) may not be appropriate in the prevailing situation in Punjab to declare a Proclamation in the State. It is, therefore, felt that Article 352 may be suitably amended in its application to the State of Punjab to include 'internal disturbance' in any part on the grounds that the integrity of India is threatened by internal disturbance in any part of the territory of India so as to facilitate the taking of action under that article if it becomes necessary at a future date. The expression 'internal disturbance' was one of the grounds included in that Article from the commencement of the Constitution till it was amended by the Constitution (44th Amendment) Act, 1978. Consequentially, Article 358 and 359 are also proposed to be amended so as to provide for the suspension of Article 19 of the Constitution and the issuing of an order by the President suspending the operation of any provisions of the Constitution and the other provisions contained in Part III (except Article 20) under Article 359, if and when a Proclamation of Emergency on the ground of internal disturbance is issued in relation to the whole or any part of the State of Punjab.

The newly introduced Article 359-A had a very short life, being withdrawn after barely a year by the Constitution (63rd Amendment) Act, 1989. Both these Acts of Amendment could have been avoided had the Forty-fourth Amendment not deleted 'internal disturbance' and substituted it with 'armed rebellion'.

The earliest landmark case under the Emergency provisions was the *Makhan Singh* case. Pursuant to the Chinese aggression in September 1962 a Proclamation of Emergency was issued on 26 October 1962. The Presidential Order under Article 359 provided that the right of any person to move any court for the enforcement of a right conferred by Articles 14, 21 and 22 of the Constitution would remain suspended if such person had been deprived of any such right under the Defence of India Act,

---

310 *Makhan Singh v State of Punjab* (1964) 4 SCR 797
1962 or any Rule or Order promulgated under it. Makhan Singh detained under the Defence of India Act and Rules was able to successfully challenge his detention by filing a writ of Habeas Corpus in an appeal before the Supreme Court consequent to orders passed against him in Punjab. The seven member bench of the Supreme Court in this case ordered Makhan’s detention to be set aside and demonstrated the appeal for habeas corpus was maintainable even in the face of a Presidential Order if the detention was perverse and malafide and thereby outside the purview of Art.359(1).

Although the hostilities with China ceased within weeks, the emergency was not revoked and continued well beyond the 1965 war with Pakistan and only after sustained public protests was it eventually brought to an end on 10 January 1968.

The second occasion for invocation of emergency powers came in December 1971, following the fresh hostilities between India and Pakistan arising out of the movement to establish ‘Bangladesh’. The Emergency also saw the enactment of a number of special legislations like the Defence of India Act, 1971 and Rules, the draconian Maintenance of Internal Security Act 1971 and for good measure the COFEPOSA in 1974 ostensibly to prevent and detain economic offenders.

Although the special powers were, by and large, invoked responsibly, this emergency saw the detention of tens of thousands of persons, including communist leaders, students, peasant and industrial workers. Nearly 20,000 railway workers were reported to have been detained under MISA following a strike call by the country’s powerful rail unions. In addition several thousand prisoners-of war were also captured and interned during this period.311

This period of emergency also witnessed several unsuccessful judicial challenges against the laws authorizing preventive detention. In Hardhan Saha v State of West Bengal312 and in Khudiram Das v State of West Bengal313 the court refused to

311 Refer ‘Emergency powers and the Indian Constitution ,Essays in honour of Nani Palkhivala by Anil B Divan
312 AIR 1974 SC 2154.
grant relief, in the first case on the ground that MISA was not violative of Articles 14, 19, 21 and 22 and in the second case on the grounds of the sufficiency of the subjective satisfaction of the detaining authority while at the same time reserving the right of the Court to examine the existence of such subjective satisfaction.

On 12 July 1975 Mrs. Gandhi was unseated as a Member of the Parliament by the Allahabad High Court following an election petition filed by Raj Narian in which she was accused of electoral malpractices. Justice Jagmohanlal Sinha of the Allahabad High Court found the Prime Minister guilty on the charge of misuse of government machinery for her election campaign. The court declared her election null and void and unseated her from her seat in Lok Sabha. The court also banned her from contesting any election for an additional six years. Ironically some serious charges such as bribing voters and election malpractices were dropped and Mrs. Gandhi was held guilty on comparatively less important charges such as availing the provision of electricity by the state electricity department and for using a dais built by the state police contrary to norms regarding its height from which she addressed the campaign rally. Some of these charges were in reality an essential part of the Prime Minister's Security protocol. Another point for which she was held responsible for misusing the government machinery was in allowing a government employee, Mr. Yashpal Kapoor, to start campaigning for her even before his resignation from government service was accepted. Because the court unseated her on comparatively frivolous charges, while she was acquitted on more serious charges, The Times described the verdict as 'firing the Prime Minister for a traffic ticket'. However, strikes in labour and trade unions, student unions and government unions swept across the country. Protests led by Jayaprakash Narayan and Morarji Desai flooded the streets of Delhi close to the Parliament building and the PM's residence.

The June 1975 emergency was declared by President Fakhruddin Ali Ahmed, acting upon the advice of the then Prime Minister, Mrs. Indira Gandhi and remains one of the most controversial periods in the history of independent India. In her own words, Indira brought democracy "to a grinding halt".

314 On the same day, the ruling Congress Party was comprehensively defeated at the polls in the State of Gujarat, a previous stronghold of the Congress by 'Jana Morcha' that had been voted to power.
President Ahmed signed the decree, invoking a state of emergency under the Constitution. Jayaprakash Narayan, Morarji Desai, Charan Singh, Jivatram Kripalani, Atal Bihari Vajpayee, Lal Krishna Advani and other protest leaders were immediately arrested. Organizations like the Rashtriya Swayamsevak Sangh and opposition political parties were banned. The Government used police forces across the country to arrest thousands of protestors and strike leaders.

As the June 1975 proclamation of emergency on account of ‘internal disturbance’ had to be imposed even while the 1971 emergency, on account of external aggression, was still operative, the Forty-second Amendment permitted the overlapping of the different proclamations issued on various grounds.\(^{315}\) The Forty-second Amendment placed the action taken under Article 352 beyond the purview of judicial review.

The Presidential Order suspending the enforcement of several fundamental rights, including the right to life and personal liberty gave a handle to the Government to resist all court actions and to deny the maintainability of petitions for *habeas corpus*. In addition, censorship of a sweeping kind was imposed on the press. A new law was passed to prevent the publication of ‘objectionable matter’, which included anything defamatory of the Prime Minister, and which authorised the government to impose a wide range of harsh sanctions against those deemed to be violating its provisions\(^ {316}\). Parliament became a rump and far-reaching constitutional amendments and laws were enacted within a few days without any debate in the House or outside\(^ {317}\).

After the declaration of emergency on 25 June 1975, a large number of people were being detained primarily on the basis of their political association on the ground

\(^{315}\) Clause(4) as inserted by the Forty-second Amendment has been renumbered clause (9) by the Forty-fourth Amendment Act, 1978 and reads as follows:

\ldots The power conferred on the President by this Article shall include the power to issue different Proclamations of different grounds, being war or external aggression or armed rebellion or imminent danger of war or external aggression or armed rebellion, whether or not there is a Proclamation already issued by the President under Clause (1) and such Proclamation is in operation\ldots

\(^{316}\) The Press Council (Repeal) Act 1976.

\(^{317}\) Refer 'Emergency powers and the Indian Constitution ,Essays in honour of Nani Palkhivala by Anil B Divan
of internal disturbance. Many of these detention orders were passed under the provisions of the Maintenance of Internal Security Act, 1951 (MISA). Consequently, writ petitions were filed in the various high courts. Nine of the High Courts upheld the right to entertain petitions for habeas corpus in the teeth of strenuous arguments to the contrary from Government lawyers, with one of the Chief Justices observing that, ‘if the argument of the Government be accepted, the ghost of Hitler would stalk the land’.

The Delhi High Court struck down the order of preventive detention against Kuldip Nayar, a well known journalist. In another case, the Bombay High Court refused to countenance an order of the city’s Police Commissioner refusing permission for a private meeting of lawyers wishing to debate the emergency.\(^{318}\)

However when the matters were carried to the Supreme Court in appeal, in ADM Jabalpur v Shivakant Shukla\(^{319}\) the Court by a majority of four to one, held that the citizens had no remedy against arbitrary detention as Habeas Corpus petitions were not maintainable for as long as the Presidential Order suspending the enforcement of Art.21 and Art.22 remained in force. Lawyers and laymen alike were shocked and the import of the judgment was loud and clear- no one who opposed the dictatorial executive was safe anymore!

The majority decision (Ray, CJ, Beg, Chandrachud and Bhagwati, JJ) appear to have been simplistically based upon the open-ended nature of the words in the Presidential Order of 27 June 1975. Th Court compared the 1962 Presidential Order which was considered in the Makhan Singh case with the 1975 Presidential Order which came up for consideration in the ADM, Jabalpur case. The 1962 Presidential Order declared that:

...the right of any person to move any court for the enforcement of the right conferred by Article 21 and 22 should remain suspended for the period during which the proclamation of emergency issued under Clause (1) of Article 352 on 26 October

\(^{318}\) N.P.Nathwani v Commissioner of Police (1976) 78 Bom LR 1.
\(^{319}\) AIR 1976 SC 1207
1962 is in force, if such a person has been deprived of any right under the Defence of India Ordinance, 1962 or any Rule or Order made thereunder.

The 1975 Presidential Order did not carry the words ‘if such a person has been deprived of any such rights under the Defence of India Ordinance, 1962 or any Rules of Order made there under’. The majority held that the 1962 Presidential Order was ‘confined and limited by the condition of deprivation of rights under the Defence of India Ordinance or any Rule or Order made there under’, whereas in the 1975 Presidential Order no statute was mentioned and therefore Habeas Corpus petitions were not maintainable for as long as the Presidential Order suspending the enforcement of Art.21 and Art.22 remained in force.

Khanna J, in what can be described as conscientious dissent, took the view that even in the absence of Article 21 of the Constitution; the State has no power to deprive a person of his life or liberty without the authority of law. Khanna J, while dealing with the question of rule of law, pointed out that even in the absence of Article 21, the State has no power to deprive a person of his life and liberty without the authority of law. This, he rightly said, ‘is the essential postulate and basic assumption of the rule of law. The rule of law was meant to flow out of this very concept and was meant to be the benchmark of balancing individual liberty and public order which again was to be ensured by independent courts. Without the sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning’. Life and liberty were described as priceless possessions, and the mere mention of Article 21 in the Presidential Order could not lead automatically to a suggestion that a person could be deprived of these without the authority of law. Khanna J’s opinion looks at the practical effect of the Presidential Order upon the rights of the citizen; the opinions of the majority evades even examining, far from appreciating, the direct impact on the individual rights of a citizen while such an immunity favoured the executive. The majority legalistically examined the interpretation of the 1975 Presidential Order while failing to appreciate that any guarantee of right is matched by enforceability. After all, what is a right unless it is enforceable and capable of being subject to redress? Khanna J quoted the
felicitous words of Lord Mansfield in *James Sommersett*\textsuperscript{320}. 'It is so odious that nothing can be suffered to support it but positive law: whatever inconvenience may follow from this decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged …'

He also quoted the words of Lord Mansfield in *Fabrigas v Mostyn*\textsuperscript{321} 'To lay down in an English court of justice that a Governor acting by virtue of Letters Patent, under the Great Seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and effect His Majesty's subjects both in their liberty and property, with impunity, is a doctrine that cannot be maintained…'

Khanna J also referred to Articles 8 and 9 of the Universal Declaration of Human Rights\textsuperscript{322} and held that the Presidential Order must be capable of being construed as authorizing only bonafide executive action, thus, 'the Presidential Order, therefore, should be so construed not to warrant arbitrary arrest or to bar right to an effective remedy by competent national tribunals for acts violating basic right or personal liberty granted by law'. According to the law in India before the Constitution came into force, no one could be deprived of his life and personal liberty without the authority of law, and in view of Article 372, this continued to be the law even after the Constitution was adopted.\textsuperscript{323}

The judgment of the majority in *A.D.M.Jabalpur* evoked justifiable disappointment both in the legal profession and public opinion. To quote the reaction of H M Seervai, an eminent authority on Constitutional law on the *habeas corpus* judgment:

---

\textsuperscript{320} (1772) 16 Cri. Pract.289
\textsuperscript{321} 1 Crown 161
\textsuperscript{322} Universal Declaration of Human Rights, Articles 8 and 9:
   Article 8: Everyone has right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by him by the Constitution or by law.
   Article 9: No one shall be subjected to arbitrary arrest, detention or exile.
\textsuperscript{323} Refer "Emergency Provisions under The Indian Constitution", by Gopal Subramanium in *SUPREME BUT NOT INFALLIBLE*, Essays in Honour of the Supreme Court of India, Oxford University Press, pages146-151
"The four judgments were delivered in the darkest hour of India's history after Independence, and they made the darkness complete......Ordinary men and women could understand Satan saying 'evil be thou my good' but they were bewildered and perplexed to be told by the four learned judges of the Supreme Court that, in substance, the founding fathers had written in to the emergency Provisions of our Constitution, 'Lawlessness be thou our law'.

The Constitutional (Thirty Eighth) Amendment Act, 1975, enacted during the period of the emergency(1975-1977) made the President's satisfaction in a proclamation of emergency under Article 352(5) and 356(5), final and conclusive, and stipulated that such satisfaction shall not be questioned in any court on any ground. It further barred the jurisdiction of any court to adjudge the validity of a proclamation made by the President and also the continued operation of such proclamation. The Constitutional (Forty Fourth) Amendment, however introduced a number of safeguards against such abuse of power and clause 5 of Article 352 and Article 356(5) were withdrawn.

As a further check against misuse of the emergency provisions, Article 359 was amended so as to provide that the presidential power to suspend the right to move the court for the enforcement of a fundamental right cannot be exercised in respect of the fundamental rights guaranteed by Article 21 and 21. The protection of Article 21 nullifies the majority decision in ADM v Shukla (1976 Supp SCR 172).

Pursuant to the Forty-fourth Amendment Act, Article 358 provides that Article 19 can remain suspended during an emergency imposed on grounds of (i) external aggression and, (ii) war, but not on grounds of armed rebellion. Law can be enacted and executive powers exercised inconsistent with Article 19 and their validity cannot be challenged pending an emergency or even thereafter. There is, however, a proviso that the protection to legislative and executive acts modifying rights under Article 19 will be available only when there is a specific recital to the effect that such law is in relation to the proclamation of emergency and the executive action is only under a law encapsulating such a recital.
There are two differences between Article 358 as modified by the Forty-fourth Amendment and Article 359 similarly modified. The amendment Article 358 is operative only in the context of an emergency declared in the wake of (i) war and (ii) external aggression but not (iii) armed rebellion. The suspension under Article 359 of the right of resort to law courts is in the context of all the three types of emergencies. Article 358 is for the entire duration of emergency while Presidential Orders under Article 359 can even be for short periods as may be specified in the order. The point of convergence between Articles 358 and 359 is that the laws impacted by both these Articles should have a specific recital to the effect that these laws have been made in the context of the emergency. Under Article 359, the rights would revive on the cessation of emergency and can be enforced even in relation to the period of emergency.324

Non-derogable provisions during Emergency in India compared with the corresponding provisions of the ICCPR

Pursuant to the 44th Amendment Act of the Constitution the non-derogable provisions during an emergency are now more in line with the comparative provisions cited in Articles 6, 7, 8 (Paragraphs 1 and 2), 11, 15, 16 and 18 of the ICCPR. Presently Article 20 and 21 of the Constitution of India will continue to apply even when an emergency is declared. Since Article 21 of the Indian Constitution embraces the principles enshrined in Articles 6, 7, 8 (paragraphs 1 and 2) and 16 of the ICCPR the consonance with these provisions continue. With respect to Article 11 of ICCPR the prevailing position is that despite India’s reservation to this article at the time of ratifying ICCPR pursuant to the Apex Court ruling in Jolly George Varghese v. Bank of Cochin due protection is given to a judgment debtor who lacks the wherewithal to make payment. In the said case, noting that ‘poverty is not a crime’, Justice V.R. Krishna Iyer took pains to point out how the Civil Procedure Code in India is wide enough to protect judgment debtors who lack fund from undergoing imprisonment. Krishna Iyer J construed the said Section 51 of the Civil Procedure Code in such a

324 Refer Emergency Provisions under The Indian Constitution, by Gopal Subramaniam in SUPREME BUT NOT INFALLIBLE, Essays in Honour of the Supreme Court of India, Oxford University Press, pg 144.
way as to avoid conflict with Article 11 of the International Covenant on Civil and Political Rights, 1966. He observed:

“Article 11 of the International Covenant on Civil and Political Rights only interdicts imprisonment if that is sought solely on the ground of inability to fulfill the obligation. Section 51 of the Civil Procedure Code also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Section 51 of the Code, but this does not violate the mandate of Article 11 of the Covenant on Civil and Political Rights. However, if he once had the means but now has not or if he has the money now on which there are other pressing claims, it is violative of the spirit of Article 11 of the Covenant to arrest and confine him to jail so as to coerce him into payment”.

Article 20 of the Indian Constitution well corresponds to Article 15 of the ICCPR and ensures that there is due protection against Ex-Post Facto laws even during the imposition of an emergency.

The point of divergence with the Constitutional Provisions in India and the ICCPR in the present context is that Article 18 of the ICCPR which expressly recognizes the freedom of conscience and religion during a Public Emergency remains suspended in India when an emergency is declared. With respect to other personal freedoms like freedom of speech and expression, the right to assemble peaceably and form associations, the right to move freely and reside in any part of the territory of one’s country and the right to freely follow and trade, business or occupation, as cited earlier pursuant to the Forty-fourth Amendment Act, Article 358 of the Indian Constitution provides that Article 19 can remain suspended during an emergency imposed on grounds of (i) external aggression and, (ii) war, but not on grounds of armed rebellion. Though laws can be enacted and executive powers exercised inconsistent with Article 19 and though their validity cannot be challenged pending an emergency or even thereafter there is a proviso that the protection to legislative and executive acts modifying rights under Article 19 will be available only when there is a specific recital to the effect that such law is in relation to the
proclamation of emergency and the executive action is only under a law encapsulating such a recital.

The researcher therefore submits that presently the Constitution of India does reflect the salutary spirit of Article 4 of the ICCPR and the non-derogable provisions enshrined therein are duly preserved even in times of an emergency in India.

Internal Emergency: The development of Article 356

Article 356 derives its origin from section 93 of the Government of India Act, 1935 which, along with section 45 of the Act, provided for situations arising out of a failure of the constitutional machinery in the federal government and the provinces. Under these sections, the Governor General (in relation to a federation) and the Governor (in relation to a province) could in their discretion exercise their powers and assume to themselves the powers of the federal and provincial legislature respectively. Section 93 of the Government of India Act, 1935 empowered the Governor himself to issue a proclamation and assume to himself the necessary powers in conditions of a failure of the constitutional machinery in the State. The original draft Article 278 also followed the same pattern, since the earlier proposal was to make the office of the Governor an elective one, but when that provision was altered in favour of the Governor being appointed by the President the section 93 (Government of India Act, 1935) pattern had to be abandoned in favour of vesting the Governor with only a recommendatory role.325

The power under Article 356 flows from the responsibility enumerated in Article 355, casting a duty on the Union to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of the Constitution.

Article 356 provides that if the President on receipt of a report from the Governor or otherwise, is satisfied that the government of the state cannot be carried

325 Refer "Emergency Provisions under The Indian Constitution", by Gopal Subramaniam in SUPREME BUT NOT INFALLIBLE, Essays in Honour of the Supreme Court of India, Oxford University Press, pages 146-151
on in accordance with the provisions of the Constitution, the President may, by proclamation (a) assume to himself the executive powers of the state, and (b) declare that the powers of the legislature of the state shall be exercisable by or under the authority of Parliament. Significantly, the proviso to Article 356(1) rules out the assumption of the powers of the high court. The report from the Governor falls within the ambit of his discretionary power, as stated in Article 163(2) of the Constitution.326

During such an emergency, the President can take over the entire work of the executive, and the Governor administers the state in the name of the President. The Legislative Assembly can be dissolved or may remain in suspended animation. The Parliament makes laws on all the 66 subjects of the state list. All money bills have to be referred to the Parliament for approval. The background to the invocation of Article 356 varies from causes such as a no-confidence motion against the council of ministers (defeat of the government on the floor of the House), resignation of the Chief Minister, break-up of a coalitions and defections, to public agitation, and reasons such as the emergence at the centre of a party other than that in power in the state.327

The proclamation issued on 30 April 1977 in relation to nine states introduced a new precedent. The 1977 elections to the Lok Sabha witnessed a rout of the Congress party at the Centre. The Union government took the view that the electorate had expressed a complete lack of confidence in the party that was in power in these

326 Article 163 of the Constitution – Council of Ministers to aid and advise Governor : (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court....

327 The first instance of defections leading to President's Rule took place as far back as in November 1954, when T. Prakasam's Ministry in Andhra was brought down by the ruling party members voting with the opposition in the no-confidence motion. Defections became more frequent after the 1967 general elections. In Haryana (1967 November) defections had become endemic. These had made a mockery of the Constitution and had brought democracy to ridicule (President's Rule in the States and Union Territories, Lok Sabha Secretariat, New Delhi, 1996). The earliest use of Article 356 related to Punjab as long ago as 20 June 1954. Kerala and Punjab have been placed under President's rule nine times each. The longer spells of President's rule have been in Jammu and Kashmir and Punjab.
nine states based on an earlier verdict of the electorate. Consequently, these governments were dismissed and the legislatures dissolved. The Supreme Court by its order of 29 April 1977 refused to intervene. Following the mid-term Lok Sabha elections in January 1980, a similar proclamation was promulgated in relation to nine states on a similar ground that the ruling party in these states no longer represented the people. The proclamation of 15 December 1992 dismissed the three BJP governments in Rajasthan, Madhya Pradesh and Himachal Pradesh, consequent to a similar proclamation in relation to Uttar Pradesh on 6 December 1992 issued in the wake of the demolition of a disputed (Babri Masjid) structure in Ayodhya.

While the Constitution (Thirty-eighth Amendment) Act, 1975 sought to bar judicial review of a proclamation under Article 356 'on any ground' this clause was dropped by the Forty-fourth Amendment (1978). A land mark judgment on Article 356 emerged in S.R.Bommai & Ors v Union of India & Ors, in which a bench of nine judges undertook a fairly exhaustive analysis of the amplitude and dimensions of Article 356 and adjudicated on the validity of Presidents rule imposed in Karnataka wherein the governor had recommended Presidents rule claiming that the government headed by Sri S.R. Bommai lacked majority without calling for a test of the strength of the Ministry on the floor of the House. In the instant case the validity of similar proclamations under Article 356(1) in the States of Meghalaya and Nagaland were also examined besides testing the validity of Presidents rule imposed in Madhya Pradesh, Himachal Pradesh and Rajasthan in the wake of the Babri Masjid Demolition (the government in these states belonged to the Bharatiya Janata Party (BJP) which was sympathetic to the organizations responsible for the demolition). The Apex Court declared the Karnataka, Meghalaya and Nagaland proclamations as unconstitutional.

328 The Supreme Court cannot ....interdict use of powers under Article 356(1) unless and until resort to the provision, in a particular situation, is shown to be so grossly perverse and unreasonable as to constitute patent misuse of this provision or an excess of power on admitted facts. The most that one could say is that a dissolution against the wishes of the majority in a State Assembly is a grave and serious matter. Perhaps, it could be observed that it should be resorted to under Article 356(1) of the Constitution only when 'a critical situation' has arisen. But the question is whether the State Assembly and the State Government for the time being have been so totally and emphatically rejected by the people that a 'critical situation' has arisen or is bound to arise unless the 'political sovereign' is given an opportunity of giving a fresh verdict. A decision on such a question undoubtedly lies in the Executive realm. (state of Rajasthan v Union of India (1977) 3 SCC 592)

329 (1994)3 SCC1
while upholding the proclamation of emergency in Madhya Pradesh, Himachal Pradesh and Rajasthan

Prior to the Bommai judgment, the decision in Rajasthan\textsuperscript{330} came dangerously close to the doctrine of 'the political question' adopted by the US Supreme Court, and discussed extensively in Calgrove v Green\textsuperscript{331} and Baker v Carr.\textsuperscript{332} State of Rajasthan conceded the competence of the Union to dissolve a state assembly under Article 356. Notwithstanding the then Clause (5) of Article 356 the Supreme Court held that the Court could legitimately examine the question whether the President had issued the proclamation on mala fide or irrelevant considerations. The Forty-fourth Amendment, by deleting all the provisions in the various emergency provisions restraining judicial review had given a clear indication that the Court could institute a proper enquiry into the grounds of any proclamation of Article 356.

The Bommai decision concurred with State of Rajasthan to the extent that the Court cannot abandon a judicial review on the ground that the issue raises a political question. However, the minimal area of judicial review adopted in the State of Rajasthan was abandoned in Bommai in favour of a wider scope and extent of judicial review. It may be recalled that in State of Rajasthan it was held that the satisfaction of the President is a subjective matter and cannot be put to objective tests.\textsuperscript{333}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{330} State of Rajasthan v Union of India (1977) 3 SCC 592.
\item \textsuperscript{331} (1945) 328 US 549
\item \textsuperscript{332} (1962) 369 US 186.
\item \textsuperscript{333} ...The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the government of the state cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of United States has described as 'judicially discoverable and manageable standards'. It would largely be a political judgement based on assessment of diverse and varied factors, fast changing situations, potential consequences, public reaction, motivations and response of different classes of people and their anticipated future behaviour and a host of other considerations, in the light of experience of public affairs and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic government. It cannot therefore, by its very nature be a fit subject matter for judicial determination and hence it is left to the subjective satisfaction of the central government which is best in a position to decide it. The Court cannot in the circumstances, go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the central government is based. That would be a dangerous exercise
\end{itemize}
\end{footnotesize}
With respect to justiciability, the *Bommai* decision came to the conclusion that the Court should look into whether there was any material leading to the President's satisfaction\(^{334}\): The Court can also verify that the satisfaction of the President was not 'absurd, mala fide or perverse or based on extraneous and irrelevant grounds'.

The views expressed by the various judges of the Supreme Court in this case concur mostly with the recommendations of the Sarkaria Commission. The areas in which the *Bommai* judgment has provided clear directions for the future are for-

(i) the insistence on the floor test;

(ii) the non-dissolution of the Assembly prior to ratification by Parliament;

(iii) upholding the basic constitutional value of secularism and

(iv) For declaring that a State government should not be dismissed under Art.356 (1) solely on the ground that a different political party had come to power in the Center.

*Bommai*\(^ {335} \) is therefore a landmark contribution to facilitate upholding of democratic values.\(^ {336} \) Thus it can be seen from the conclusions of this Bench of the Supreme Court that the President's power under Article 356 is not absolute or arbitrary. The President cannot impose Central rule on a State at his whim, without reasonable cause.

**Financial emergency**

Besides external and internal emergencies, the Constitution also provides for the President to declare a financial emergency under Art.360 in a situation in which

---

334 In the instant case it was observed that even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken'. (Per Jeevan Reddy J and Agarwal J agreed to by Pandian J, and dissented to by Satwant J and Kuldip Singh J).

335 S.R. Bommai v. Union of India, (1994) 3 SCC 1, 296-297, ¶ 434

336 Adapted from "Emergency Provisions under The Indian Constitution", by Gopal Subramanium in SUPREME BUT NOT INFALLIBLE, Essays in Honour of the Supreme Court of India, Oxford University Press, pages146-151
the financial stability or credit of India or of any part of the territory is threatened\textsuperscript{337}. During such an emergency the executive authority of the Union can extend to giving suitable directions to the state to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.\textsuperscript{338} Such a Presidential Proclamation shall be laid before each house of Parliament and shall cease to operate at the expiration of two months, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.\textsuperscript{339}

Further clause 4 to Art.360 states that it shall be competent for the President during the period of a financial emergency to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including Judges of the Supreme Court and the High Courts. Besides all money bills are to be reserved for the consideration of the President after they are passed by the Legislature of the State.

India has been fortunate in that ever since Independence a situation warranting the declaration of a financial emergency has not arisen. It is indeed hoped that Art.360 will merely remain a 'dead letter'.

\textsuperscript{337} Art.360(1) states that "If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect".
\textsuperscript{338} Vide Art 360(3).
\textsuperscript{339} Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.