CHAPTER VII

Abuse of Powers in State of Emergency in India: A Survey

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7.1 INTRODUCTION

"Real Swaraj will come not by acquisition of authority by a few but by the acquisition of the capacity by all to resist authority when it is abused.'

- M. K. Gandhi

Generally there are two sets of circumstances- normal and abnormal i.e. Emergency, under which constitutions have to function. There might be some antisocial element internal or external which can disturb the normal social order and constitutional life.

For every nation to have emergency provisions i.e. extra ordinary powers is essential to protect itself. The trend is that laws of the land remain silent or inactive during emergency period and the normal functioning of nation is suspended. Different new laws and control systems comes into action. To provide for emergency in the constitution in order to to meet the situation is essential and justified too. But there is all chances that while using excessive powers, administration may cross its limits and abuse and encroach upon the liberty of citizens and violate human rights. During such situation the philosophy behind the declaration of emergency that it is for the purpose of protecting its citizens from crisis, proves wrong and the civil liberty of its citizens gets affected to the worst of its degree. H.M. Seervai has observed:- "The common men and women of India - Ill fed, ill clothed and ill looked after, opted for freedom, freedom from harsh, tyrannical and oppressive

laws and from equally oppressive executive action."

The question arises as to who should be held responsible and liable for abuse and how. How and why the powers that are to protect the nation are abused? What generally happens during emergency and how the normal constitution fabric and functioning of the government of normal times gets changed? An analysis of that would help to determine the areas where actually the extra ordinary powers of emergency are liable to be abused. Though it is difficult to establish clear cause and relationship between state of emergency and abuse of power resulting in violation of human rights.

7.2 CONCEPT OF ABUSE

The term 'abuse of power' includes everything, which the term 'unreasonable exercise of power' includes.

Abuse or use of power depends on the assessment of extent of use of these powers. Whether or not there was any limit prescribed or instructed any were in relevant Acts. Abuse of power is also described as 'wrong motive' or mala fide. When the power is used other than for what it has been intended under enabling statute, it will be considered as abuse of power. 'Improper considerations' 'Failure to take all considerations in to account', 'acted unreasonably' and 'colourable exercise of power’ are some of the terms that express abuse of power.
In R. D. Shetty vs. International Airport Authority \(^2\) Justice P. N. Bhagwati, who delivered the judgment of the court, held:-

Exercise of discretion is an inseparable part of sound administration and therefore, the State which is itself a creature of the Constitution, cannot shed its limitation at any time in any sphere of State activity.

It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards of invalidation of an act in violation of them.

It is indeed unthinkable that in a democracy governed by the rule of law the executive government or any of its officers should possess arbitrary powers over the interests of an individual. Every action of the executive government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.

It establishes that the exercise of discretion must not be arbitrary, fanciful and influenced by extraneous considerations. In matter of discretion the choice must be dictated by public interest and must not be unprincipled or unreasoned. It must be governed by policy, standards, procedural safeguards or guidelines, failing which it will amount to abuse and shall be quashed by the courts.

\(^2\) AIR 1979 SC 1628 SCC 489
In England where parliament is supreme and can confer any amount of discretion on the administrative authority, the courts have always held that the concept as 'unfettered discretion' has no place. Besides, the discretion must be exercised in conformity with the general policy of the Act and for a proper purpose. The courts insists on its reasonable exercise.

In USA besides the judicial review of administrative discretion which is available in the due process clause, the Administrative Procedure Code Provides that the reviewing court shall hold unlawful and set aside actions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

In France the administrative courts exercises power of judicial review over administrative action if the authority abuses its discretionar powers.

### 7.3 COMMON CHARACTERISTICS OF EMERGENCY

There are some specific changes that take place during emergency which reflect the actual political arrangement of power.-

- During emergency all other mechanism of government are shut down and all powers judicial as well as legislative is concentrated in executive,
- For purpose of security, power of arrest and detention becomes necessary. Even on slight suspicion a person is detained,
- Special courts are formed to deal with political matters.
New Acts are promulgated and stringent actions are prescribed under new Acts especially made to deal with offences of special nature. Constitutional guarantees are suspended including personal liberty. Courts powers are substantially curtailed. Power to issue writs like *Habeas Corpus* and *Ampro* are suspended. Freedoms are restricted. The administration e.g. security force and police enjoy immunity from the use of excessive power.

During normal constitutional order three main functionaries control the nation. The executive, the legislature and the judiciary. During emergency the judiciary is eliminated, legislative power comes in the hands of executive and thus parliament alone remains alive with all the function under its jurisdiction. The emergency enlarges the power of the center over States and of the executive over individual liberty.

What is remarkable under Indian constitution is that Article 50, 53, 74 and 75 of the constitution are not affected by the emergency. These articles explain the powers of President working and his relation with council of ministers. That means if the President works on the advice of his council of minister in normal times, in the emergency also he works in similar way. Emergency does not make the President more or less powerful than in the normal times. Alladi as member has said in the debate of Constitutional Assembly ‘the President throughout the constitution means always the President advised by the council of minister’

This proves that constitutional provisions to some extent are justified and as we have already discussed in previous chapters there are some checks also. The basic problem is administration, using administrative resources to save the country and at the same time being dangerous themselves to their countrymen. To be protected from the protector itself is the biggest problem before the citizens.

7.4 AREAS OF ABUSE AND ITS CONSEQUENCES

While Article 352 was being discussed in constituent assembly, its possible misuse was contested very loudly for the fear of establishing a dictatorship.

The main areas of high possibility of abuse have attracted attention of judiciary as well as constitutional thinkers again and again. Following are the main areas where under the extra ordinary powers during emergency possibility of abuse is very high.

1. Presidential power to issue proclamation of emergency
2. Law making authority of the executive during emergency
3. Suspension of basic rights
4. Administrative powers

7.4.1 Presidential power to issue proclamation of emergency

The emergencies that were called upon in 1962 and 1971, the 'satisfaction' of President was not questioned as the security of nation was endangered and there was sufficient justification to the announcement of emergency by the President. But the third emergency the most controversial
one from different points of view has shocked the country. 'Internal disturbance' as the basis of Presidents satisfaction was not accepted as justified criteria for emergency by the legal world. This emergency has opened the eyes of all those who have ruled out any misuse of the emergency powers in future. What the members of constituent assembly cautioned had come to be true before the country. What happened actually is not unknown

At this point it is important to find out the agencies that administers the emergency provisions.

First comes the President. He must be "satisfied" and declare so; and then only there is an Emergency. The President is a single individual and he might misjudge; or he might abuse his position and deliberately misuse the provisions. This was discussed in the Constituent Assembly. Members expressed apprehension; but, by and large, the founding Fathers were satisfied that the chances were not many. First, as Alladi said, the President always means the Cabinet; singly he cannot do anything. Anyhow, as a precaution, Kamath wanted that Art. 352 should be amended to say categorically that the President "acting upon the advice of the Councils of Ministers" could proclaim the Emergency. But this could only be a paper safeguard, because nothing prevents such a determined President, if he wants to abuse the power, from dismissing unwilling ministers and appointing men of his own choice before the declaration.

According to the Fathers, the normal built-in check available against
the President, viz., "aid and advice" of the Cabinet, would do. Theoretically, they were correct. Issue of massive abuse of power was since then been the important subject before the judiciary.

Thus a narrow view of the scope of judicial review over "acting reasonably" was taken. The Supreme Court in *Minerva Mills V. Union of India* examined the justification or the validity of the proclamation of emergency.\(^4\)

J. Bhagwati observed - merely because a question has a political complexion that by itself, is no ground why the court shrink from performing its duty under the constitution, if it raises an issue of constitutional determination. It would not therefore be right for the court to decline to examine whether in a given case there is any constitutional violation involved in the Presidents issuing the proclamation of emergency’

He further observed:-

"The court cannot go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. The satisfaction of the President is a condition precedent to the exercise of the power under Article 352 (1), and if it can be shown that there is no satisfaction of the President at all, the exercise of power would be constitutionally invalid, Where, therefore the satisfaction is

\(^4\) AIR 1967 SC. 1335
absurd or perverse or mala fide at all, it would be liable to be challenged before the court.

Where...the satisfaction is absurd or perverse or malafide or based on a wholly extraneous and irrelevant ground, it would be no satisfaction at all and would be liable to be challenged before a court."

This remarkable judgment set certain rules:

1) Proclamation of Emergency is not immune from judicial scrutiny.
2) The court however cannot substitute its own satisfaction for that of the President.
3) So long as the proclamation is not revoked by another proclamation it would continue to operate irrespective of the change of circumstances.
4) The court has no power to interfere with the satisfaction of the executive government in regards to its continuation unless it is clear on the material on record that there is absolutely no justification.
5) The court may if satisfied beyond doubt grant a writ of mandamus directing the government to revoke the proclamation of emergency. It was held in *Lakhanpal vs. Union of India*\(^5\) it is not necessary for the President to recite in the proclamation the fact of his satisfaction about the emergency.

The Supreme Court has thus overruled its earlier decision held in *Ghulam Sarwar vs. Union of India*\(^6\) that the question of existence of an emergency has been left to the subjective satisfaction of the President and is not justifiable by the courts thus being powerless to review that satisfaction.

\(^1\) MR 1977 S.C. 722
\(^6\) AIR 1968 S.C. 1335
Second comes 'council of ministers' liable to abuse the power, where the possibility is very high. During third emergency the procedural legality of the declaration of emergency was questioned. In case of situation when the ruling party is in majority, as it was the case in 1975, the possibility of procedural abuse becomes very obvious. It may abuse this power for party interests. The Fathers thought that the provision of collective responsibility would solve the problem, responsibility is responsibility, they thought. The Constitution really contains a built-in check in the form of the office of President. After all, he is the guardian of the Constitution and he is vested with some powers, and nothing can happen without his "satisfaction"; and if he has sufficient reason to suspect foul-play on the part of his Cabinet, he could as well refuse the declaration. They also thought that the President could declare the Emergency and it would be in duration for two months even without the approval of the Parliament, and much mischief could be possible meanwhile; and once the approval was given, there was nothing the Parliament could do, they thought. The important point is that Parliament is always there; it can always take action. But can the Parliament be relied? Ordinarily, Parliament's approval comes easily, both for the first ratification and for later renewal. Thus, if all the three- President, Cabinet and Parliament agree, it can not be checked at all. There can be no protection against the protector.

Another way the abuse may come is when the President wants to bypass his Ministers having a majority in the House of the People-and this is a greater possibility when the President and the majority in the council of
States belong to one party and the Ministers and the majority in the House belong to another. The President may dismiss his Ministry, dissolve the House, appoint another Ministry, get approval from the Council of States and reign supreme with Ordinances either without election or without caring to call the House.

At this point it will not be irrelevant to discuss and understand the concept of royal Prerogative under English law. The English law provides for the Royal Prerogative. This is the power that vests in crown, which is absolute and is not regulated or depends on statute. There are some powers vested in crown which can be exercised only and on the advice of minister such as treaties with other country, mercy power, conferment of honors, the government of dependent colonies, management of Armed Forces, declaration of war and peace and the waging of war, which can be effected by the prerogatives without recourse to parliament legislation. It has always been assumed that the courts will be zealous to define and delimit the extent of the Royal Prerogative, but that is no concern of the courts to control the manner in which the Prerogative is exercised within those limits. To some extent Indian law accepted the same trend regarding powers of the President.

7.4.2. Law making authority of the executive during emergency

During emergency under Article 353, 358 the legislative power of the State stands widened and the State gets empowered to impose restrictions on the enjoyment of Article 19 and the restrictions imposed by the executive
are considered valid. The State becomes competent to impose restrictions on any ground whether or not mentioned in the relevant clauses of Article 19. Such restrictions would be valid even if they are unreasonable.

Prior to independence, the judiciary tried to protect the people against executive excess only to some extent. In *Talpade's case*⁷ Rule 26 made under the Defence of India Act was declared void as beyond the rule making power. This decision was of great help to the cause of civil liberty in India but the spirit of the decision and the observations of the court were entirely ignored by the executive in India.

Before 1976 suspension of Article 19 under Article 358 extended to the whole of India whereas the order of President under Article 359(1) may extend to the whole of India or any part thereof. But this distinction was not valid under the 42nd Amendment Act, 1976. All these amendments gave unrestricted powers in the hand of executive, who in turn extensively abused them in passing many laws in different parts of India, in order to provide security.

The 44th amendment Act has introduced stricter safeguards in emergency provisions.

⁷ AIR 1958 S.C. 765
Preventive detention laws- a serious abuse

International Protection

"Preventive Detention" means that detention of a person without trial in such circumstances that the evidence in possession of the Authority is not sufficient for conviction by legal proof but may still be sufficient to justify his detention. The object of preventive detention is said to prevent the individual not merely from acting in a particular way, but from achieving a particular object.

Unfortunately detentions are accepted as an inevitable part of any modern State. Almost all countries even those who consider themselves fully democratic permits detention at the sole satisfaction of the executive authorities.

Universal Declaration of Human rights by General Assembly of the United Nations set a common standard of achievement for the people and nations to the end that every individual and every organ of society keep this declaration promises that everyone has the right to life, liberty and security of person.

Article 9 provides that no one shall be subjected to arbitrary arrest detention or exile. Under Para 2 of Article 9 it further provides that anyone who is arrested shall be promptly informed of any charges against him. Para 4 of Article 9 gives a right to anyone who is deprived of his liberty by arrest or detention to take proceedings before a court in order that court may decide
without delay on the lawfulness of his detention and release if the detention is not lawful.

Para 5 of Article 9 further provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. International law recognizes that every administrative detainee has the right to take proceedings before court. Also Article 11 provides that everyone charged with penal offence has right to be presumed innocent and he has had all the guarantees that are necessary for his defence.

Article 9 and 11 of ICCPR as well provide for protection against arbitrary detentions in the similar manner. It also provides for further safeguards.

Inter American court of Human Rights has called it the intangible rights, which are essential as a minimum guarantee for the rights guaranteed by the covenant. There should be no scope for a person to be detained or arrested without the matter being tried before the normal judicial tribunals.

**Preventive Detention Power Under Indian Laws**

Preventive detention laws were legacy of British rule enacted under wartime regulation under Defense of India Act and Rules 1939. Laws authorizing preventive detention have been in force almost uninterruptedly since the adoption of constitution. Moreover in India the power to issue
Preventive detention orders are entrusted to a large number of officers not responsible to any legislator, who are subordinate to the Government and are liable to follow the dictates of the Government.

A provision for preventive detention is provided in the Indian Constitution in Part III dealing with the Fundamental rights, under Article 22. Though nation felt necessity of preventive detention it has also provided safeguards to mitigate the harshness by placing fetters on legislative and executive powers. Thus the constitution provides that no law providing for preventive detention shall authorize the detention of a person, as detention would be subject to certain procedural restrictions. Article itself provides for some procedural safeguards with the result that no law providing for detention can cut down the safeguards mentioned in the fundamental rights.  

Article 359 in part XVI provides that when, declaration of Emergency was in operation, the executive can by order declare that the right to move any court for the enforcement of any of the fundamental rights conferred by part III of the constitution shall remain suspended for the period during which the proclamation is in forces. Thus giving wide powers to the executive liable to be misused.

44th Amendment provided further procedural safeguards. Unfortunately this 44th Amendment Act has not yet been brought into force,

8. Clauses (4 ) to (7) of Article 22 provide the procedure for preventive detention under Part III of the constitution
Preventive detention was only permitted if there was a law authorizing it- Detention by executive fiat was ruled out. Even the power to enact laws for preventive detention without trial was not unlimited: It was subject to the constraints.

In pursuance of Article 22, Parliament enacted the Preventive Detention Act, 1950 empowering the central and the State Governments to detain a person "if satisfied, . . . . . It is necessary to do so" in order to prevent him from acting in any manner prejudicial to the defense of India. Nation has witnessed the misuse of preventive Detention law during emergency, in the two emergencies, India had known until 1975, during the quarter century since Constitution came into force. The justification for the initial proclamation in 1962 and in 1971 was never in doubt as they were declared because of war conditions. But for the 1975 Emergency, many disputed the justification for the proclamation on the basis of "internal disturbance".

During all the three emergencies consequence was the increased use of preventive detention. During third emergency it was worst. The power was misused against political opponents and economic offenders and suspension of the right to apply to the courts for enforcement of fundamental rights.

Preventive detention law of 1950 was revived in the form of MISA 1971, which lasted till August 1978. A Presidential ordinance amended the Maintenance of Internal Security Act; by removing the detainee's right to be
informed of the grounds of arrest. It was made sufficient for the authorities to declare that the arrest was made to safeguard the security of India.

Again in 1980 the President issued National Security ordinances which subsequently became the Act. Another Act that needs mention are COFEPOSA and SAFEMA. Preventive detention has also been authorized by number of state laws, war time measures and special anti-terrorist legislation of different deviation enacted over the years. These acts had also been challenged for their extraordinary powers of detention and seizure of property.

The history of atrocities of preventive detention power did not end here. In 1987 to deal with special kind of situation of terrorism TADA was passed. The act provided sweeping powers to the state government, which in effect means local politicians, and police, when it is likely to be misused in their hands. These acts had far reaching implications on the rule of law.

These Acts altered the balance between the powers, restricting the powers of the judiciary and increasing those of the executive, as well as increasing the powers of the Central Government in relation to the State governments.

Judicial challenges to the legality of these laws on the grounds of their adverse impact on fundamental rights have been partially successful.
Almost every preventive detention Act was challenged before the Supreme Court for its constitutional validity. Its relationship with other fundamental rights under Articles 14, 19 and 21 were also challenged. Hundreds of thousands of such abuses, spread over large parts of the country, including extra-judicial executions, disappearances', arbitrary detention, and questionable denial of basic freedoms such as freedoms of expression, freedom of assembly and freedom of association have been experienced throughout.

Both the Supreme Court and high courts have time and again invoked rules of procedural strictness and principles of administrative law to control executive discretion in the use of the preventive detention power and its consequential abuse.  

The Courts tried to imbibe principles of Natural Justice in to the proceedings of cases relating to preventive detention. The hopes of founding fathers that these powers would be used sparingly have been failed. It was most arbitrarily used by Mrs. Gandhi to stop the political opposition to her rule, which resulted in the arrest and detention of hundreds of thousands of persons during 1975, And then by successive Congress and non Congress governments to suppress dissent among groups of population in states such as Punjab, Kashmir and Assam.

Many of these laws failed to confirm to the constitutional validity. They also do not correspond to evolving international standards of human rights. Preventive detention during normal times is not forbidden under international human right law. But the Human Right Committee in its general comment and Article 9 of the ICCPR has stressed that where preventive detention is used it must be subject to same restrictions as those applicable to other kinds of detention namely, it must not be arbitrary, it must be based on ground and procedure establish by law. The detention must be amenable to judicial control and the detainee must be entitled to compensation for wrongful confinement.

The great constitutional expert H.M. Seervai puts it this way, "if free democratic country like the United States, Canada and Australia and the United Kingdom are able to get on well without preventive detention in times of peace, why cannot India ?"

Whether the Laws enacted under the power conferred under Article 353 without invoking emergency were right, the Supreme Court gave its opinion in Kartar Singh vs State of Punjab. It asserted that the TADA, was 'enacted by parliament as a piece of emergency legislation for a certain length of time.' Thus referred to it as an emergency law.

10. U.N. Doc. CCPR/11/add. at p 472
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**Election Laws under Article 329-A**

The Supreme Court had to rule on the constitutional validity of the changes made to the election law. Which clearly aimed at nullifying the effect of the Allahabad High Court’s Judgment unseating Mrs. Gandhi from parliament. The constitution 39th amendment Act to pre-empt an unfavorable verdict to her appeal against that judgment in the Supreme Court, introduced a new provision article 329A, which, among other things, removed the jurisdiction of the courts in the matter of the election of any MP who subsequently became Prime Minister or Speaker of the Lok Sabha, and abated any election petition relating to these functionaries which had been pending before any court. More controversially, this article also provided that no existing law relating to election petitions would apply, or would be deemed ever to have applied, in relation to the election of such persons to Parliament, and further more that any such election which had been declared void by a court would continue to be valid. In effect, this provision directed the Supreme Court to allow Mrs. Gandhi’s appeal without going into its merits in any manner whatsoever.
Changes made of constitution relating to Election laws have been almost universally condemned. They indicated Mrs. Gandhi's resentment against the independence of the Allahabad High Court in allowing the election petition against her. It is well-established fact that any dignitary however high, must be subject to the requirement that the election should not have been secured by corrupt practices.

It was challenged in the Supreme Court, though there was a divergence of opinion among the judges, a majority of the Bench upheld the challenge and declared Art 329(4) void.

The effect of the judgment was that the government made an unsuccessful attempt to have the Supreme Court set aside its landmark judgment in Keshvenand Bharti which had laid down that parliament could not, in exercise of its power to amend the constitution, alter or destroy its basic structure.

7.4.3. Suspension of basic rights

During the period the order of the President under Art. 359 is in operation, the State would be free to make any law or take any action in violation of the rights mentioned therein. Before the constitution (38th Amendment) Act, 1975 only the remedy of moving any court for the enforcement of the fundamental rights mentioned in the Presidential order was suspended but not the rights themselves. The amendment added new
Clause (4) in Art. 359, affecting that not only the remedy but the rights themselves are suspended.

**Right to Life and personal Liberty**

The attitude regarding the effect of emergency on the right to life and personal liberty, changed with the 44th amendment, 1978, because this amendment has now provided in Art. 359 that the Presidential order under Article. 359 shall not suspend the enforcement of Arts 20 and 21. Previously there was no such restriction and Presidential order included suspension of Article 20 and 21.

Art 21 guarantees the most important and most fundamental of the fundamental rights i.e., the right to life and personal liberty without which all other rights are meaningless. No person can be deprived of his life or personal liberty except according to procedure established by law which must be just, fair and reasonable.

"When we come across orders of this kind by which citizens are deprived of the fundamental right of liberty without a trial on the ground that emergency proclaimed by the President in 1962 still continues and the powers conferred on the appropriate authority by the Defense of India Rules justify the deprivation of such liberty, We feel rudely disturbed by the thought that the rules by the several authorities is likely to make the paramount requirement of the Constitution that even during an emergency the freedom
of the Indian citizen cannot be taken away without the existence of justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which conceivably results from the continuous use of such unfettered powers may ultimately pose a serious threat to basic values on which the domestic way of life in this country is founded.”

A question however arises as to whether any law, containing such a recital or any executive action taken thereunder can be challenged for being violative of the fundamental rights under Article 359 (1). In Keshavananda Bharti, the Supreme Court invalidated second part of newly added Article 31C, holding that this is to give effect to the policy of the state to implement directive principles under Article 39(b) or (c). It shall not be questioned before any court on the ground that it does not give effect to any of these directive principles. On the analogy of this case, it is submitted that a law containing such a recital or any action thereunder would be subject to the scrutiny of the court.

The Human Right Committee under ICCPR has expressed particular concern that some of the special security legislation derogated even from the non-derogable rights contained in the covenant. They have mentioned Armed Forces Act, National Security Act, TADA etc. as a prominent example in this category. The committee has also shown its displeasure over its

14. UN Doc CCPR / C/ SR 1042
examination of India’s Third Periodic Report. It said that - India has to face difficulty in dealing with terrorism, it was nevertheless incumbent on a State party to tackle such problems in a manner consistent with the covenant’s requirements. The existing practice led to de facto declaration of emergency.\footnote{UN Doc CCPR / C / SR 1603}

\subsection*{7.4.4 The misuse of the Emergency powers by the Administration.}

It is because of the abuse by the administration that even an otherwise law-abiding and patriotic citizen is made to suffer with the Emergency-and also with the most clumsily worded Art. 359, which allows him some fundamental Rights and yet denies him their enforcement.

Administrative harassment of the citizen is an every day affair in India, and Emergency makes it worse. The emergency saw many injustices compounded by harsh treatments, torture of large number of persons by the police. Censorship and other restrictions on freedom of speech and expression was the prime causality of emergency. Restriction on freedom of assembly and association was also attacked during the emergency. Ordering transfers arbitrarily also harassed judiciary.

The Shah Commission has submitted an intensive Report on the atrocities by administration on the common man.\footnote{Shah Commission was appointed on 28 May 1977 under Sec 3 of the Commission of Inquiry Act, to Inquire into the excessive malpractices and misdeeds committed during the emergency}
7.4.5 Prolongation of emergency

There is another way the abuse that might come, the one we have already experienced in our country, where the Proclamation is prolonged beyond reasonable period. In this case, at the time of Proclamation, the President, the Cabinet and (ordinary) majority of the House are together, the party is unable to do anything against its own leaders in the Cabinet.

This is a serious kind of abuse, but one of its own kind where the original Proclamation was justified but not its continued duration. The majority in the House is hands in glove with the executive.

Analysis

The survey of the state of human rights is that, not only have rights suffered quite severe curtailment by legislative changes that has been brought about at both federal and state levels, but also that there has been a clearly identifiable pattern of serious, systematic and widespread abuse of rights which are attributable to the state for which the state can be held responsible.

Indian judiciary has produced a strong tradition of landmark decisions over an important issue of abuse of emergency powers by the executive. In the later period we notice that specially after the habeas corpus case the judiciary took revolutionary attitude and gave more emphasis to the justifiability of every executive action during emergency\(^\text{17}\)

\(^{17}\) The attitude of judiciary has been discussed in detail in chapter VIII
7.5 EXISTING REMEDIES AND PREVENTION OF ABUSE

The right without remedy is of no value. Indian constitution guarantees remedies to individual affected by administrative agencies in the form of Article 32, 136, 226 and 227. The whole law of judicial review of administrative action has been developed by judges and consequently suffers from certain inconsistencies.

Judicial review of administrative action under Indian Constitution is not only an integral part but also forms basic structure of the constitution.¹⁸

Under Article 32(1) supreme court guarantees the right to move the court for the enforcement of fundamental rights.

Under Article 32(2) Supreme Court is empowered to issue directions, orders or writs for the enforcement of these rights.

Courts in India have expanded the scope of their extraordinary jurisdiction under Arts 32 and 226 of the Constitution to compel the government to do what it is legally bound to do. What comprises government's duty has been inferred from a liberal interpretation of Art21 of the Constitution. Such assumption of jurisdiction has doubtlessly empowered the citizen against

the executive as well as the legislatures. Not only this the Supreme Court has not confined itself to judge-made law in the traditional sense of the term, but has embarked upon legislation to fill in the gaps left by legislatures through a device called 'directions.'

**Article 32 and 226**

The Supreme Court and the High Courts have power to issue writs in the nature of *mandamus, certiorari, prohibition*, etc., under Arts. 32 and 226 respectively.

**Habeas corpus**

Though the traditional function of the writ of *habeas corpus* has been to get the release of a person unlawfully detained or arrested, the Supreme Court has widened its scope by giving relief through the writ against inhuman and cruel treatment meted out to prisoners in jail. In Sunil Batra the court stated that the dynamic role of judicial remedies... imparts to the habeas corpus writ a versatile vitality and operational utility that makes the healing presence of the law live up to its reputation as bastion of liberty even within the secrecy of the hidden cell.

The court has thus permitted the use of the writ for protecting personal liberties to which the arrested persons or prisoners are entitled to, under the

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Because of the prevalence of preventive detention, many petitions for habeas corpus frequently come before the courts. As personal liberty of an individual is a cherished value, the court has consistently shown great anxiety.

It provides a speedy and effective remedy to a person under unlawful detention. The most important feature of the writ is its peremptoriness.

**Quo warranto**

The term quo warranto means- what is your authority. The writ of quo warranto is used to judicially control executive action in the matter of making appointments to public offices under relevant statutory provisions. The writ is also used to protect a citizen from the holder of a public office to which he has no rights.

**Mandamus**

Mandamus is a command issued by a court to an authority directing it to perform a public duty imposed upon it by law.

**Certiorari and prohibition**

These writs are designed to prevent the excess of power by public authorities.

These writs can now be issued to anybody, irrespective of the nature of the function discharged by it, if any of the grounds on which the writs are
issued is present. Certiorari and prohibition are now regarded as general remedies for the judicial control of both quasi-judicial and administrative decisions, affecting rights of individual.

Article 136, special leave to appeal-

Art confers a very special appellate jurisdiction on the court. 136. It has great significance in Administrative Law. Under this provision, the Supreme Court has power to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any courts or tribunal in the territory of India, except a court or tribunal constituted by a law relating to armed forces.

Innumerable adjudicator bodies outside the regular judicial hierarchy function in the country in the modern administrative age. It is therefore extremely desirable that there should exist some forum to correct misuse of power by such bodies. To leave these bodies outside the judicial control would be negation of the rule of law. Act. 136 along with Arts. 32 and 226 comes handy to avoid any such situation. The Supreme Court can always seek to control Administrative bodies through the technique of appeals under Art. 136, in spite of any statutory provision to the contrary.

Article 227 of the High Court Power

Article 227 invests high court with power of superintendence over
administrative agencies exercising adjudicatory powers. The nature of this power is both administrative and judicial.

The Forty-second Constitution Amendment Act, 1976 has affected this power of the High Court by deleting the word 'tribunal' in Article 227, but the Forty-fourth constitution Amendment Act, 1978 restored this power.

The courts in India have always held the view that judge-proof discretion is a negation of the rule of law. Therefore, they have developed various formulations to control the exercise of administrative discretion.

The right to move the court for the enforcement of fundamental rights can be suspended during a declaration of emergency, this is exception to the availability of constitutional remedies under Article 352 but in Makhan Singh\textsuperscript{18} the Supreme Court held that - the contention that the words 'right to move the court should be restricted to the constitutional remedies given by Articles 32, and 226 , leaving the remedy of Habeas corpus provided by s 491 of Cr PC Intact' was rejected. The Court however made it clear that while a detenu under the Defence of India Act could not question the detention on the ground of violation of specified fundamental rights, it could do so on the ground that it was not in accordance with the rules of the Act or was malafide or was other wise unconstitutional.

The majority made the following observations, which are of great importance:
"If in challenging the validity of his detention order, the detainee is pleading any right outside the rights specified in the order, his right to move any court in that behalf is not suspended, because it is outside itself. Let us take a case where a detainee has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detainee to content that this detention is illegal for the reason that the mandatory provisions of the Act have been contravened. Such a plea is outside Article 359 (1) and the right of the detainee to move for his release on such a ground cannot be affected by the presidential order."

The French system of administrative adjudication.

In France, the administrative courts exercise power of judicial review over administrative action if the administrative authority abuses its discretionary powers. The term 'abuse' includes everything which the term 'unreasonable exercise of power includes. A French scholar Garnar expresses his view that their must be some other new grounds, than the doctrine of ultra virus. He mentions the doctrine of detoumement de pouvoir be more effective to review the excessive use of emergency power by executive.\textsuperscript{20} The doctrine of detoumement de pouvoir is that it is necessary to consider whether the motive which inspired the authority to administer the Act are those which in accordance with the intention of the legislature ought to have inspired him. The ground of detoumement de pouvoir means that though the

\textsuperscript{20} Brown and Garnar, French Administrative law 2nd edn Chapter 9
public authority has presented the external legal formalities, yet it has used the power granted to it to secure a purpose outside the intended scope of the power. This ground has found recognition in India too. Has the administrator used his power to attain an end or objective, which was mentioned in the contemplation of the legislature? The French administrative courts will not only look at the terms of the statute but also consider the travaux preparatoires. The French administrative courts review an administrative act where there has been any of the forms of misuse of administrative power, such as obstruction to the course of justice, fraud on the law, acts inspired by the partisan rather than the public interest, an act done in the interest of third party, an act inspired by political passion, an act inspired by public interest other than that which caused the creation of power (wrong motive) etc.

The procedure followed for annulling administrative action is known as the *recours en annulation pour excès de pouvoir*. The object of this procedure is to quash an administrative act or decision, which is improper. "The test of reasonableness is much broader in France. It is an overriding principle of the French administrative law that an administrative act is proper and, therefore, lawful only if it is reasonable, the opposite of capricious or arbitrary, and, further, the administrator must produce the reason before the tribunal (Conseil d'État) whenever it think that there is sufficient ground for producing the reason.

Further, in France, beyond this, there is much developed ground of *la
violation de la loi/which means the conseil a"Etat can quash an administrative action which appears to it not to be in accordance with the French legal system though it does not infringe any positive enactment. Thus, the Conseil imposes on the administration conformity to a standard of conduct not enacted as obligatory by any statute.

The commendable attitude of judiciary

As for judicial supervision on substantive grounds, the Indian courts have used a variety of administrative law principles to strike down executive action like Rule of law and Natural Justice. In a case, for example, where the detaining authority had furnished to each of the three detained persons, documents alleging that they were all 'dangerous persons' within the meaning of a law which authorized the preventive detention of such persons,21 but where the documents did not relate specific incidents to particular individuals, it was held that the order of detention was vitiated by non-application of mind on the part of the detaining authority.22 The courts have similarly set aside detentions where preventive detention powers have been used as a convenient substitute for the normal process of the criminal law.23 They have struck down preventive detention orders passed against persons who are already in jail awaiting trial of criminal offences.24 The courts have also insisted that, whenever a detention is challenged in judicial review or other

23. Bhunath v State of West Bengal AIR 1974 SC 2154
proceedings, the affidavit in reply from the state should only be made by the officer who had authorized the detention, as he alone would have personal knowledge of the facts of the case.\textsuperscript{25} Where there is unreasonable delay in arresting a person against whom an order for preventive detention has been made, and where the authorities are unable to provide a satisfactory explanation for the delay, the courts have often quashed the detention on the grounds of colourable exercise of power.\textsuperscript{26}

7.6 CONCLUSION

Our constitution makes the executive the sole judge to decide if emergency exists and also it makes the executive solely responsible for meeting it. Emergency calls for an emergent action and it is necessary to arm the government with sufficient powers to meet the crisis situation. But at the same time such vast powers are liable to be abused, and such abuse, to the extent it could be prevented must be checked.

The thrust should be at the point of occurrence of such abuse of power rather than punishing them after long procedure of judiciary. The prevention at the point of excessive exercise of power should be checked. Some stricter norms apart from statutes that confer power must be there for the administration to follow while exercising their powers during abnormal conditions.

Therefore administrative action is the residuary action, which is neither legislative nor judicial. It is concerned with the treatment of a particular

\textsuperscript{25} Ghazikhan v State of Rajasthan (1990) 1 SCC 434
\textsuperscript{26} U Iqbal v Union of India (1992) 1 SCC 434
situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising "administrative powers". Unless the statute provides otherwise, a minimum of the principles of natural justice must always be observed depending on the fact situation of each case.

Administrative action may be statutory, having the force of law, or non-statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but its violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonably.

The French system is an advanced one and considering the development in the field of administrative justice the courts must follow the system.

"Thus within the area of administrative discretion the courts have tried to fly high the flag of rule of Law which aims at the progressive diminution of arbitrariness in the exercise of public power" I. P. Massey.27