

# CONSTITUTIONAL LAW

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*JUDICIAL REVIEW OF PRESIDENTIAL  
PROCLAMATION UNDER ARTICLE 352*

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SUBMITTED BY:

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*Mayuri*

*KIIT LAW SCHOOL*

*KIIT UNIVERSITY*

*BHUBANESHWAR*

## **INTRODUCTION**

A notable feature of the Indian Constitution is the way in which the normal peace time federalism can be adapted to an emergency situation. Proclamation of emergency is therefore a very serious matter which adversely affects the rights of the people. So, it must be issued only in exceptional circumstances. An emergency according to Article 352(1) can be proclaimed by a president if he is satisfied as to the existence of a threat to the security of India or a part thereof. The question which the topic deals with is – whether this satisfaction of the President is justiciable or not.

The Courts have through a span of time considered the effect of proclamation of emergency in a number of cases on preventive detention, effect of the suspension of Article 19 following a proclamation of emergency and on the effect of the President's order under Article 359. These decisions will be discussed as and when the need arises.

The concept of India being a federal system was upheld by Dr. B.R. Ambedkar and he said that although the people are divided into different states but they belong to India which is a union of the states. There was a debate regarding conferring Emergency powers on the head of the nation but Dr. Ambedkar said that such articles would never be brought into operation and would remain a dead letter. But, the situation has proved to be otherwise Article 356 has been abused, misused but seldom has it been used.

The Constitution of India provides for three different types of emergencies which can be proclaimed under different situations. The situations being:

- Emergency arising from a threat to the security of India.
- Breakdown of Constitutional machinery in the state.
- Financial Emergency

### 1. **NATIONAL EMERGENCY**

The provisions relating to this emergency are mentioned under Article 352. President has been given the power to proclaim an emergency in the whole of India either on his own satisfaction or on the request of Council of Ministers headed by Prime Minister.

Under Article 352 if the President is satisfied that a grave emergency exists whereby the security of India or any part thereof has been threatened, whether by war or external aggression or armed rebellion, he may by proclamation make a declaration to that effect. Such a proclamation may be made in respect of the whole of India or such a part of the Indian Territory as may be specified in the Proclamation.

Before 1978 an emergency could be declared because of war, external aggression or internal disturbance. The term internal disturbance was too vague and broad. The 44<sup>th</sup> Constitutional Amendment substituted the word armed rebellion for internal disturbance.

The Supreme Court has also explained in a case<sup>1</sup> that the expression internal disturbance has a wider connotation than armed rebellion in the sense that armed rebellion is likely to pose a threat to the security of the country or a part thereof while internal disturbance though serious in nature would not pose a threat to the security of the country or a part thereof.

The intention underlying this situation is to therefore limit the invocation of Article 352 only to more serious situations where there is a threat to the security of the country and the reason for restricting the scope was that the proclamation of emergency under Article 352 has a very serious impact on the powers of the state as well as on the Fundamental Rights of the people.

#### CONSEQUENCES OF EMERGENCY UNDER ARTICLE 352

Following are the consequences that follow the proclamation of an emergency under Article 352:

- There is a transformation in the behavior of the Indian Federalism. The normal fabric of centre-state relations undergoes a change and the Parliament is empowered to make a law in any of the subjects mentioned in the state list also. So, the distribution of the Legislative power somewhat remains suspended.
- The Centre becomes entitled to give directions to the state as to the manner in which it must exercise its executive power.

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<sup>1</sup> *Naga People's Movement of Human Rights v. Union of India*. AIR 1998 SC 431.

- Parliament can levy any tax which ordinarily falls within the purview of the State list.

## 2. STATE EMERGENCY:

Article 356 provides for meeting a situation arising from the failure of the Constitutional machinery in a state.

If the President on receipt of a report from the governor of a state or otherwise is satisfied that a situation has arisen in which the Government of a state cannot be carried on in accordance with the Constitution, the president may by proclamation:

- Assume to himself all or any of the functions of the State Government, or the powers of the Governor, or any body or authority in the state other than the state legislature.
- Declare that the powers of the State Legislature are to be exercised by the parliament.
- Make such incidental provisions as may appear to him to be necessary or desirable for giving effect to the provisions of the Proclamation. The President may even suspend in whole or in parts the provisions of the Constitution relating to anybody or authority in the State.

## CONSEQUENCES OF INVOKING AN EMERGENCY UNDER ARTICLE 356

- The Presidential Proclamation may dissolve the State Legislature and the arrangement for holding fresh elections is set afoot. But it is not inevitable to dissolve the legislature as it can also remain suspended for the period of emergency and later when it is revoked the same Government might come into force.
- Parliament has the power to legislate even on the matters enumerated in the State List which otherwise are not in the power of the Parliament to legislate upon.

## DIFFERENCE BETWEEN ARTICLE 356 AND ARTICLE 352

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- Article 352 restricts Central intervention to a situation of war, external aggression or armed rebellion whereas Article 356 applies to a situation of failure of the Constitutional Machinery of the state.
- Under 352 Centre gets the power to legislate in the matters in the State List and hence make an uniform policy throughout India whereas under 356 the State Legislature ceases to function as it is either dissolved or is suspended.
- Art. 352 affects the Fundamental Rights whereas Art. 356 does not.

## JUDICIAL REVIEW OF PRESIDENTIAL PROCLAMATION UNDER ARTICLE 356

There has been a continuous attempt on the part of the Courts to bring the invocation of the emergency under Article 356 within the judicial scrutiny. This has been tried to keep a check on the powers and to prevent any arbitrary behavior.

The essence of Judicial Review lies in the fact that the role model for governance and decision making should manifest equity, fair play and justice. So, the act of governance should withstand the test of judiciousness and impartiality so that it does not turn out to be oppressive, fanciful and arbitrary. Principle of governance should therefore be tested by the Judiciary. Judicial review therefore should not be considered as an excessive delegation of power but as a measure to check whether the acts done are in accordance with the Constitution or not.

POSITION IN EARLIER JUDGMENTS

In *Bhut Nath v. State of West Bengal*<sup>2</sup> the Supreme Court refused to hold the continuation of emergency under Art. 352 void and stated that the question involved here is – “*a political, not justiciable issue and the appeals should be to the polls and not to the courts.*”

Through the 42<sup>nd</sup> Amendment sub-article (5) was inserted in Article – 352 which made the President’s satisfaction in proclaiming an emergency final and conclusive and provided that such satisfaction shall not be questioned in any court on any ground and further barred any of the courts to consider the validity of the proclamation made by the president and also the continued operation of such a proclamation. It was clearly meant to exclude Judicial scrutiny of a proclamation or its continuance. Then, this clause (5) was deleted by the 44<sup>th</sup> Amendment and this itself shows that at any rate the jurisdiction of the court to go into the mala fide issue of a proclamation or its mala fide continuance was not to be excluded.

With this Amendment the position is: it is left on the Supreme Court to decide whether it will treat the satisfaction of the president to issue the proclamation of emergency, or to vary it or to continue it, as final and non-justiciable or as being subject to judicial review on some grounds.

At this stage let us discuss some of the leading judgments on this issue of Judicial Review of Presidential Proclamation:

- The cases decided in the 1960’s held that there could be no judicial review of the Presidential Proclamation. To cite a few of them:

High Court of Kerela in *K.K. Aboo v. Union of India*<sup>3</sup> : President had ample material for his satisfaction before declaring an emergency and it is not open to the Courts to question the validity of the proclamation under Art. 352.

There were a series of cases before and after this which pertained to similar issues and had same judgments. It was also found to be a common belief that since the President is not

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<sup>2</sup> AIR 1974 SC 806

<sup>3</sup> AIR 1965 Ker 229

amenable to any of the courts and is guaranteed immunity by the Constitution of India how can the Proclamation issued by him on his satisfaction be considered by the Judiciary as it is equivalent to bring him into question.

All these arguments were given emphasis and the Proclamation was beyond the competence of Judiciary.

But, then a change in decisions started and:

In *Minerva Mills Ltd. v. Union of India*<sup>4</sup> Justice P.N. Bhagwati expressed his view that wherever the President while proclaiming the emergency had applied his mind or whether he had acted outside his powers Emergency could not be excluded from the scope of Judicial Review.

In *S.R. Bommai v. Union of India*<sup>5</sup> view of High Courts about judicial review was that there could be no judicial review of the Presidential Proclamation. But then the Supreme Court held that the judicial review was possible and the validity of the proclamation issued can be reviewed. This further gave strength to the observation laid down in *Minerva Mills Ltd. v. Union of India*.<sup>6</sup> All the judges agreed that a Proclamation issued under Art. 352 is not completely beyond Judicial Review and mala fides provide a ground for Judicial Interference.

It was held in *S.R. Bommai*<sup>7</sup> that Article 356 Clause 1 is not immune from judicial review. Courts can strike down the proclamation if it is found to be malafide or based on totally irrelevant or extraneous grounds.

Article 74(2) merely bars an enquiry into the question what advice was given by the ministers to the President. It does not debar the Court from examining the material on which it was given. If the material is found to be irrelevant or not connected the Court can strike down the Proclamation as being ultra vires and has the power to restore the dismissed Government and reactivate the Legislative Assembly which was kept under suspension. So, the susceptibility of Proclamation under Article 356 to judicial review is beyond dispute.

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<sup>4</sup> AIR 1980 SC 1789

<sup>5</sup> AIR 1994 SC 1918

<sup>6</sup> *Supra n.4*

<sup>7</sup> *Supra n.5*

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Article 352 states that if the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof has been threatened by war, external aggression or armed rebellion he may by proclamation make a declaration to that effect.

So, it is a Presidential order and is issued on the grounds that the security of India is at threat. There are some consequences which follow the invocation of an emergency like Article 353, 358, 359 etc. There is an essential difference between Article 358 and Article 359 which needs to be highlighted:

- Article 358 suspends the rights under Article 19 only to an extent that legislature can make laws contravening Article 19 during the proclamation of emergency and the executive is competent to act under such laws whereas Article 359 suspends the enforcement of any or all the Fundamental Rights whatever is explicitly mentioned in the Constitution.
- Article 358 does not provide for Indemnity whereas Article 359(1) does not.

It has been held through various cases that judicial review of Article 356 is open when the proclamation is based upon wholly extraneous or irrelevant grounds and whether the exercise of power conferred by the Article has been malafide.

The question which arises here is that whether the Proclamation under Article 352 be challenged on the same grounds as Article 352.

The grounds on which Emergency under Article 352 is invoked is threat to the security of India which gives us a conclusion that Article 352 is an example of the defence power. Article 53(2) states that the President of India is the supreme commander of all the forces. So he has all the necessary information regarding the position of the Defence in the Country. As a supreme commander of these forces if he gets a feedback that there is a threat to the security of the country by any means and he reasonably apprehends the same then the President takes the first step towards tackling the situation that is to declare an emergency.



While the courts of law in normal times are competent to weigh the competing claims of the individuals and Government they are ill equipped to determine whether the situation threatens the life of the community and whether it constitutes an emergency. Once an emergency is declared they cannot measure the degree to which the preservation of the life of community is threatened by internal aggression and the degree of governmental control which should be exercised.

It was also held by Justice A.N. Ray in *ADM Jabalpur v Shivkant Shukla*<sup>8</sup> that- “*jurists do not have the vital sources of the information and advice which are available to the Executive and Legislature nor do they have the burden of formulating and implementing the programmes of the Government and the political responsibility of the people which are very important.*”

This is an important reason why the Courts have been reluctant to enter into the review of proclamation under Article 352.

The second ground for the challenge is review for the enforcement of the Fundamental Rights. The Courts interpret the Constitution and laws in accordance with laws and judicial conscience and not on the basis of the morality alone. Violation of Fundamental Rights cannot be challenged as the object and purpose of Emergency provisions is to provide the Executive with special situations and when Constitution has itself provided for curtailment of Fundamental Rights because such a restriction is there in the Constitution under Part 18 of the Constitution.

So, in my opinion although the effects of Article 352 are much graver than those of Article 356 it cannot be judicially reviewed as the subject matter on which the emergency is invoked is beyond the knowledge and scope of the jurists.

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<sup>8</sup> AIR 1976 SC 1207