

Emergency Provisions: Effects and Impact.

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Emergency Provisions: Effects and Impact

Federalism according to Dicey is a weak form of government because it involves division of power between the Centre and the units. Every modern federation, however, has sought to avoid this weakness by providing for the assumption of larger powers by the federal government whenever unified action is necessary by reason of internal or external emergent circumstances. For different kinds of emergencies, [The Indian Constitution] confers extraordinary powers upon the union. The emergency provisions provided under the Constitution enables the federal government to acquire the strength of a unitary system whenever the exigencies of the situation so demand.

There are times when a nation is unexpectedly and suddenly overtaken by events and forces, which seriously endanger its security and the lives of its citizens. Such situations may require that the individual liberties of the citizens be temporarily suspended in order to cope with the dangers confronting the nation. Emergency situations place democratic governments in a real dilemma by bringing about a conflict between its primary obligation to protect the integrity of the State and its equally important obligation to protect the human rights of its citizens and other persons within its jurisdiction. The State is forced into a choice between competing values and the sacrifice of one to the other. That is the rationale of emergency provisions, which finds place in many national constitutions permitting the suspension of guaranteed fundamental rights.

Emergency provision is a unique feature of Indian Constitution that allows the Centre to assume wide powers so as to handle special situations. In emergency, the Centre can take full legislative and executive control of any state. Emergency provision also allows the Centre to curtail or suspend freedom of the citizens. Existence of emergency provision in the Constitution is a big reason why academicians are hesitant to call Indian Constitution as fully federal.

The Indian Constitution provides for three different kinds of abnormal situations which call for a departure from the normal governmental machinery setup by the Constitution:

- An emergency due to war, an external aggression or armed rebellion [Article 352]. It is also known as National Emergency.
- Failure of constitutional machinery in states [Article 356]. Also known as Presidential Rule.
- Financial Emergency [Article 360].

Part XVIII of the Constitution permits the state to suspend various civil liberties and the application of certain federal principles during presidential proclaimed states of emergency.

Emergency provision falls within the Article 352 to Article 360 of the Indian Constitution.

- National emergency (Article 352)
- State emergency (Article 356)
- Financial emergency (Article 360)

NATIONAL EMERGENCY

The provision for National Emergency is provided for under the Article 352 of the Constitution. The national emergency deals with constitutional provisions to be applied, whenever there is an extraordinary situation that may threaten the peace, security, stability and governance of the country or a part thereof.

Under Article 352 of the Constitution provides for the imposition of emergency when following situations is/are present-

- War,
- External aggression or
- Internal rebellion.

Article 352 says that if the President is 'satisfied' that a grave emergency exists whereby the security of India or any part of it is threatened due to outside aggression or armed rebellion, he may make a proclamation to that effect regarding whole of India or a part thereof. However, sub clause (3) says that President can make such a proclamation only upon the written advice of the Union Cabinet. Such a proclamation must be placed before each house of the parliament and must be approved by each house within one month of the declaration of the proclamation otherwise it will expire.

It should be noted herein, that in explanation to Article 352 it has is provided that for proclamation of emergency, it is not necessary that external aggression or armed rebellion has actually happened. It can be proclaimed even if there is a possibility of the happening of external aggression or armed rebellion.

In the case of [Minerva Mills vs Union of India](#) it has been held that there is no bar to judicial review of the validity of the proclamation of emergency issued by the president under Article 352(1). However, court's power is limited only to examining

whether the limitations conferred by the Constitution have been observed or not. It can check if the satisfaction of the president is valid or not. If the satisfaction is based on mala fide or absurd or irrelevant grounds, it is no satisfaction at all. Procedure of proclaiming emergency

A proclamation can be made by the president of the country, but there are some provision for that too. The President can declare such an emergency only if the Cabinet recommends in writing to do so. Such a proclamation of emergency has to be approved by both the Houses of Parliament by absolute majority of the total membership of the Houses, as well as 2/3rd majority of members present and voting within one month, otherwise the proclamation ceases to operate.

In case the Lok Sabha stands dissolved at the time of proclamation of emergency or is not in session, it has to be approved by the Rajya Sabha within one month and later on by the Lok Sabha, within one month of the start of its next session. Once approved by the Parliament, the emergency remains in force for a period of six months from the date of proclamation. In the case it is to be extended beyond six months, another prior resolution has to be passed by the Parliament. In this way, such emergency continues indefinitely.

Procedure of revoking emergency

If the situation improves the emergency can be revoked by the President of India through another proclamation. The 44th Amendment of the Constitution provides that ten per cent or more members of the Lok Sabha can make a requisition for meeting of the Lok Sabha and in that meeting; it can disapprove or revoke the emergency by a simple majority. In such a case emergency will immediately become inoperative.

STATE EMERGENCY

It is the duty of the Union Government to ensure that governance of a State is carried on in accordance with the provisions of the Constitution. Under Article 356, the President may issue a proclamation to impose emergency in a state if he is satisfied on receipt of a report from the Governor of the State, or otherwise, that a situation has arisen under which the Government of the State cannot be carried on smoothly. In such a situation, proclamation of emergency by the President is called 'proclamation on account of the failure (or breakdown) of constitutional machinery.' In popular language it is called the President's Rule.

Such an emergency can have the following effects:

- the President can assume to himself all or any of the functions of the government of the state other than the High Court,
- declare that the powers of the legislature of the state shall be exercisable by or under the authority of the Parliament, and
- make provisions necessary or desirable for giving effect to the objects of the proclamation.

The President is not, however, authorised to assume the powers of the High Court, or to suspend any constitutional provision pertaining to it.

Procedure of Proclaiming State Emergency

Like National Emergency, such a proclamation must also be placed before both the Houses of Parliament for its approval. In this case approval must be given within two month; otherwise the proclamation ceases to operate. If during these two months, the Lok Sabha is dissolved and the Rajya Sabha has approved it, then, the proclamation shall cease to operate on expiration of thirty days from the date on which the Lok Sabha first sits after its reconstitution, unless it is approved by the Lok Sabha before the expiration of this period.

A proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the proclamation. Unless revoked, its life can be extended by six months each, several times, but in no case beyond three years. Thereafter, the President's Rule must come to an end, and the normal constitutional machinery must be restored in the State.

The 44th Amendment introduced a new provision to put restraint on the power of Parliament to extent a proclamation issued under Article 356 beyond one year.

Procedure of Revoking State Emergency

Any such Proclamation may be revoked or varied by a subsequent Proclamation.

A proclamation issued under Article 356(1) expires in any of the following modes:

- After two months of its making if it is not presented for approval before both Houses of the Parliament [Article 356(3)].
- Even before two months, if the proclamation on presentation to the Houses of Parliament fails to get approval from any House [Article 356(3)].
- After 6 months from the date of the proclamation, in case no further resolution is passed by the House of Parliament after the passage of the initial resolution approving the said proclamation [Article 356(4)].
- After the expiry of 6 months from the passage of the last resolutions of approval passed by the House of Parliament subject to an over-all maximum limit of 3 years from the date of the proclamation. Continuance of the proclamation beyond one year is subject to the fulfilment of the conditions laid down in Article 356(5):
 - a National Emergency is already in operation; or if
 - the Election Commission certifies that the election to the State Assembly cannot be held.
- The date on which the President issues a proclamation of revocation [Article 356(2)].

Difference between Article 352 and Article 356

Point of difference	Article 352	Article 356
	In situations of war external	In situation of failure of constitutional

1.Application	in situations of war, external aggression or armed rebellion.	in situation of failure of constitutional machinery in State
2.Effect	No authority to the Centre to suspend the Constitution in a state.	The state legislature ceases to function as it is dissolved.
3.Effect on Fundamental Rights	affects Fundamental Rights	Does not affect Fundamental Rights
4.Centre-State Relationship	the relationship of all the states with the Centre changes	the relationship of only one state where the action is taken changes with the Centre
5.Proclamation	Approved by the Parliament within 1 month and thereafter every 6 months and there is no maximum duration prescribed	Approved by the Parliament within 2 months and thereafter every 6 months, and the maximum period that it remains in force is 3 years.

FINANCIAL EMERGENCY

The third type of Emergency is Financial Emergency provided under Article 360. It provides that if the President is satisfied that the financial stability or credit of India or any of its part is in danger, he may declare a state of Financial Emergency. Under such situation, the executive and legislative powers will go to the centre. Like the other two types of emergencies, it has also to be approved by the Parliament. It must be approved by both Houses of Parliament within two months. Financial Emergency can operate as long as the situation demands and may be revoked by a subsequent proclamation.

This Article has never been invoked.

A Proclamation issued under Art. 360—

(a) may be revoked or varied by a subsequent Proclamation

(b) shall be laid before each House of Parliament

(c) 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.

Effect of Proclamation of Emergency

Effects of national emergency

The declaration of National Emergency effects both on the rights of individuals and the autonomy of the states in the following manner:

1. The most significant effect is that the federal form of the Constitution changes into unitary. The authority of the Centre increases and the Parliament assumes the power to make laws for the entire country or any part thereof, even in respect of subjects mentioned in the State List.
2. The President of India can issue directions to the states as to the manner in which the executive power of the states is to be exercised.
3. During the emergency period, the Lok Sabha can extend tenure by a period of 1 year at a time. But the same cannot be extended beyond 6 months after the proclamation ceases to operate. The tenure of State Assemblies can also be extended in the same manner.
4. During emergency, the President is empowered to modify the provisions regarding distribution of revenues between the Union and the States.
5. The Fundamental Rights under Article 19 are automatically suspended and this suspension continues till the end of the emergency.

But according to the 44th Amendment, Freedoms listed in Article 19 can be suspended only in case of proclamation on the ground of war or external aggression. From the above discussion, it becomes quite clear that emergency not only suspends the autonomy of the States but also converts the federal structure of India into a unitary one. Still it is considered necessary as it equips the Union Government with vast powers to cope up with the abnormal situations.

Effect of State Emergency

The declaration of emergency due to the breakdown of Constitutional machinery in a State has the following effects:

1. The President can assume to himself all or any of the functions of the State Government or he may vest all or any of those functions with the Governor or any other executive authority.
2. The President may dissolve the State Legislative Assembly or put it under suspension. He may authorise the Parliament to make laws on behalf of the State Legislature.
3. The President can make any other incidental or consequential provision necessary to give effect to the object of proclamation.

Effects of Financial Emergency

The proclamation of Financial Emergency may have the following consequences:

1. The Union Government may give direction to any of the States regarding financial matters.
2. The President may ask the States to reduce the salaries and allowances of all or any class of persons in government service.
3. The President may ask the States to reserve all the money bills for the consideration of the Parliament after they have been passed by the State Legislature.
4. The President may also give directions for the reduction of salaries and allowances of the Central Government employees including the Judges of the Supreme Court and the High Courts.

Effects of Proclamation of Emergency on the Fundamental Rights

- Federal laws will overrule state legislation, and the Union is empowered to govern areas (eg. Policing) that are normally

devoided to the states.

- The Union is also empowered to take over and completely control the taxation and budgetary revenue processes. Under financial emergency, the Union is empowered to have the final say in the promulgation of financial acts approved by the state legislature.

- The Union may decide to suspend some or all of the fundamental rights guaranteed by Part III (Articles 12 through 35) of the constitution - which include:

§ freedom of equality before law

§ freedom of speech and expression

§ freedom to assemble peacefully

§ freedom for movement across Indian territory

§ freedom to practice any profession, occupation, trade or business.

§ freedom to practice or propagate religion.

- Further, the right to challenge the suspension of the above mentioned rights (the right to constitutional remedies) may also be suspended. However, this provision will not cover the suspension of Articles 20 and 21 which govern rights to personal liberty, Right to silence, freedom from double jeopardy and freedom from unlawful arrest and detention. Any individual who deems that his rights under these categories have been suspended unlawfully, can challenge the suspensions under a court of law.

- The Union may decide to dismiss the legislative functions of a state legislature and impose federal law for a period of six months. This state of suspension may be renewed at the end of this period under the vote of Parliament (indefinite number of times) until such a time when the Election Commission of India can certify the feasibility of holding free and fair elections in the state to reconstitute the legislature.

- Any order to the above effects however, should be passed by the House of Parliament "as soon may be after it is made".

Difference between Article 358 and Article 359

In the case of **Makhan Singh v. State of Punjab**, hon'ble Supreme Court distinguished between Articles 358 and 359 as below:

Article 358	Article 359
Freedoms given by Article 19 are suspended automatically under this Article as soon as the emergency is proclaimed.	Fundamental rights are not suspended automatically it has to be done by a presidential order. Only the courts cannot be moved to enforce fundamental rights.
Article 19 is suspended for the whole period of emergency.	Right to move courts is suspended for the period of emergency or until the proclamation of the president to remove suspension of fundamental right.
Effective all over the country.	May be confined to an area.
It operates only in case of emergency on the ground of threat to the security of the country because of war or external aggression.	It operates in any emergency proclaimed under Article 352

Changes Made By 44th Amendment

Background

The proclamation of emergency is a very serious matter as it disturbs the normal fabric of the Constitution and adversely affects the rights of the people. Such a proclamation should, therefore, be issued only in exceptional circumstances and not merely to keep an unpopular government from office. This happened in June 1975 when an emergency was declared on the ground of internal disturbance without there being adequate justification for the same. The proclamation of 1975 was made on the ground of internal disturbance which proved to be the most controversial because there was violation of fundamental rights of the people on a large scale; drastic press censorship was imposed. A large number of persons were put in preventive detention without justification. In the light of these amendments have thus been made by the 44th amendment act to the emergency provisions of the constitutions to make repetition of the 1975 situation extremely difficult, if not impossible.

The 44th Amendment

The 44th amendment substantially altered the emergency provisions of the Constitution to ensure that it is not abused by the executive as done by Ms. Indira Gandhi in 1975. It also restored certain changes that were done by 42nd amendment. The following are important points of this amendment-

1. "Internal disturbance" was replaced by "armed rebellion" under art 352.
2. The decision of proclamation of emergency must be communicated by the Cabinet in writing.
3. Proclamation of emergency must be by the houses within one month.
4. To continue emergency, it must be re-approved by the houses every six month.
5. Emergency can be revoked by passing resolution to that effect by a simple majority of the houses present and voting. 1/10 of the members of a house can move such a resolution.

6. Article 358 provides that Article 19 will be suspended only upon war or external aggression and not upon armed rebellion. Further, every such law that transgresses Article 19 must recite that it is connected to Article 358. All other laws can still be challenged if they violate Article 19.

7. Article 359, provides, suspension of the right to move courts for violation of Part III will not include Articles 20 and 21.

8. Reversed back the term of Lok Sabha from 6 to 5 years.

A. Proclamation under Article 352

Article 352(1) provides that the president can make a proclamation of emergency if he is 'satisfied' as to the existence of a threat to the security of India, or any part thereof. Herein therefore the question has arisen from time to time that whether this satisfaction of the President is justiciable or not.

The position on this matter is that in the case of *Bhup Nath v. State of West Bengal*, the Supreme Court held that it is a political question and not a justiciable issue. Also to make the position more clear on this matter the 38th Amendment to the constitution added clause 5 to the Article 352 saying that the 'satisfaction' of the president as used in Article 352(1) and (3) is to mean "final and conclusive" and "could not be challenged in any court of law".

But later on after Indian democracy saw the abuse of these powers during the emergency of the 1975, by the 44th Amendment later on the provision of Article 352(5) inserted by the 38th Amendment to the constitution was revoked. Therefore the present position on this matter is that, it is upto the Supreme Court to decide whether it will treat the 'satisfaction' of the president to issue a proclamation of emergency, or to vary it or to continue it, as 'final' and 'non-justiciable', or as being subject to judicial review on some grounds.

Also it is worth noting herein that Justice Bhagwati has observed in the case of *Minerva Mills* that "whether the precedent n proclaiming the emergency under Article 352 had applied his mind or whether he acted outside his powers or acted mala fide in proclaiming the emergency could not be excluded form the scope of judicial review."

B. Proclamation under Article 356

The susceptibility of a Proclamation under Article 356 to judicial review is beyond dispute, because the power under Article 356(1) is a conditional power. In the exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. So the controversy actually revolves around the scope and reach of judicial review. From the decisions in the case of *State of Rajasthan v. Union of India* and the *Bommai* case, it is clear that there cannot be a uniform rule applicable to all cases it is bound to vary depending upon the subject matter, nature of the right, and other factors. However, where it is possible the existence of satisfaction can always be challenged on the ground that it is 'mala fides' or 'based on wholly extraneous and irrelevant grounds'. The relevance of judicial review in matters involving Article 356 is also emphasized in the Supreme Court judgment in re **State of Madhya Pradesh v. Bharat Singh**, where the Supreme Court held that it was not precluded from striking down a law passed prior to a Proclamation of Emergency, as ultra vires to the Constitution, just because the Proclamation was in force at that time.

Judicial review of the Proclamation under Article 356(1) was first tested in *State of Rajasthan v. Union of India*, in which a seven member's constitution bench of the Supreme Court by a unanimous judgment rejected the petitioner petition and upheld the centre's action of dissolving three assemblies under Article 356 as constitutionally valid.

The Supreme Court, in the case of *Minerva Mills and Others v. Union of India and Others*, dwelt extensively on its power to examine the validity of a Proclamation of Emergency issued by the President. The Supreme Court in this matter observed, inter alia, that it should not hesitate to perform its constitutional duty merely because it involves considering political issues. At the same time, it should restrict itself to examining whether the constitutional requirements of Article 352 have been observed in the declaration of the Proclamation and it should not go into the sufficiency of the facts and circumstances of the presidential satisfaction in the existence of a situation of emergency.

Thus we can safely conclude that, though limited, the Presidential Proclamation under Article 356 is subject to judicial review. The most recent case which decided the extent of judicial review of the Proclamation by the President imposing 'President's Rule' in the states and consolidated the legal position on the subjective satisfaction of the President is *S R Bommai v Union of India* was a landmark in the history of the Indian Constitution. It was in this case that the Supreme Court boldly marked out the paradigm and limitations within which Article 356 was to function. In the words of Soli Sorabjee, eminent jurist and former Solicitor-General of India, "After the Supreme Court's judgment in the S. R. Bommai case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed".

Criticism of President's Rule

The way President's Rule was imposed on various occasions has raised many questions. At times the situation really demanded it. But at other times, President's Rule was imposed purely on political grounds to topple the ministry formed by a party different from the one at the Centre, even if that particular party enjoyed majority in the Legislative Assembly. Suspending or dissolving assemblies and not giving a chance to the other political parties to form governments in states has been due to partisan consideration of the Union Government, for which Article 356 has been clearly misused.

In view of the above facts, Article 356 has become very controversial. In spite of the safeguards provided by the 44th Amendment Act, this provision has been alleged to be misused by the Union Government. That is why; there is a demand either for its deletion or making provision in the Constitution to restrict the misuse of this Article. The Sarkaria Commission which was appointed to review the Centre-State relations also recommended that Article 356 should be used only as a last resort. The Commission also suggested that the State Legislative Assembly should not be dissolved unless the proclamation is approved by the Parliament. It further suggested that all possibilities of forming an alternative government should be fully explored before the Centre imposes emergency in a State on grounds of breakdown of Constitutional machinery. The Supreme Court held in the *Bommai* case that the Assembly may not be dissolved till the Proclamation is approved by the Parliament. On a few occasions such as when Gujarat Government recommended use of Article 356 in Uttar Pradesh, the President returned the recommendation for reconsideration. The Union Government took the hint and dropped the proposal.

CONCLUSION

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Having dealt with all the Emergency provisions, it is easy to see what the purpose was behind to make such provisions in available in the Constitution in the first place. But while we did our study for the same we did realise that even if these provisions are provided for the security of the nation and also the protection of the people, the provisions in themselves give a lot of drastic discretionary powers in the hands of the Executive. It affects the federal structure of the nation essentially turning it into a unitary one while it seeks to safeguard the interests of the state and the people. Though the need for that is understood, we still think a system of check and balance should be brought into place so that unlike in the 1975 emergency, there is no misuse of power by the ruling party and the executive.

Though suspension of Fundamental Rights has been time and again tried to be justified we think that they are the most basic to the very existence of the citizens in a democracy. As the experience has been so far we have observed in our study that inspite of the safety measures that were added by the 44th Amendment to the Constitution in the emergency provisions there is still chances for the unjust violation of the fundamental rights. Therefore as there is provision in the other federal constitutions such as of the Australia and Canada the courts should be given the power to agree to the extent the Centre can expand its powers, as it will act as a built-in mechanism to check the arbitrary use of the discretionary powers available under the emergency provisions to the parliament and the executive.

M.P.Jain, 6th ed. Reprint 2012, See page 743.

Herein after referred to as the constitution.

AIR 1980 SC

AIR 1964 SC 381

AIR 1974 SC 806

Supra 3

Ibid, at 1840

AIR 1977 SC 1361

AIR 1994 SC 1918

AIR 1967 SC 1170

Supra 8

Supra 3

Supra 9

AIR 1994 SC 1918

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