

EMERGENCY POWERS AND THE COURTS

Written by Keerthana S.

LLM, Tamil Nadu National Law University, Tamil Nadu, India

ABSTRACT

The exercise of emergency powers during a crisis is a known concept to both democratic and non-democratic governments. The only difference between both the forms of government is the presence of checks and balances to avert the arbitrary use of the powers which might result in unnecessary derogation of fundamental rights. On the one hand, there is a need to safeguard individuals' fundamental rights, whereas on the other hand, there is a need to protect the public and vital national interests (in times of crisis), which may necessitate limiting such rights. The study traces the history of emergency powers from the Roman dictatorship to justify the grant of emergency powers. The aspects put forth in the International Conventions pertaining to emergency situations are discussed to analyze the impact on the national legislation. The judicial review as an instrument of control of the emergency powers is examined with respect to the US and Indian jurisdictions. This will help us gain insight on the role of the judiciary in times of crisis and the effect of proclamation of emergency. The effect of centralization of power is assessed with special importance.

Keywords: Emergency Powers, Courts, US, India, Fundamental Rights, Centralization of powers.

INTRODUCTION

The concept of the exercise of emergency powers during a crisis is familiar to both the forms of government, whether they be democratic or undemocratic systems. The sole distinction between the two is the presence or absence of checks and balances to prevent the arbitrary use and abuse of the emergency powers by the governmentⁱ. Emergency powers seek to broaden the extent or scope of the ordinary power of the government which might be insufficient in times of crisis. The legal regimes for emergencies are constitutional limits combined with statutory powers, are key to ascertaining whether the state of emergency will prove to be a threat to the constitutionalism or measure to restore stability and constitutional order. A difficult balance! It brings to the fore critical questions on the rule of law, the separation of power in the independence of the institutions. The test perhaps, of any legal system in any constitutional democracy, therefore, lies in the addressing of the fundamental tension that exists between the basic premise of the government constrained by law in the perceived need for the absolute (unfettered) discretionary power to confer the state of emergency. The threat that looms large across the globe lies in the possibility of triggering emergency like situations in a de facto manner without actually taking aid of the emergency provisions explicitly. Analyzing emergency powers might involve, a transfer of authority between the branches of government (usually transfer of powers to the executive), the expansion of the authority of the government by the curtail of individual liberties (the derogation of fundamental rights of the individuals) and centralization of power at the national level (in federal systems there is a shift to unitary form of governance). The ideology of constitutionalism i.e. the authority of the government is derived from the people and to impose limitations and restrictions on the powers of government is a fundamental element of the constitution in a democratic country. The grant of emergency powers to the government kind of overrides this ideology by giving unfettered powers to the government during an emergency crisis. The only hope for the people in this situation is constitution principles (eg: constitutionalism) which is effected by the courts. And that too can't be invoked during the period of emergency as there is derogation of fundamental rights and the courts can only look into the matters after the emergency period.

RESEARCH PROBLEM

On one hand there is a requirement to protect the fundamental rights of the individuals and on the other is the obligation to protect the public and vital national interests (in times of crises), which may sometimes involve limiting those rights.

RESEARCH METHODOLOGY

The research methodology used is doctrinal method as the project deals with studying existing laws, related case laws and authoritative and reliable materials analytically on emergency powers and the courts.

AIMS OF THE STUDY

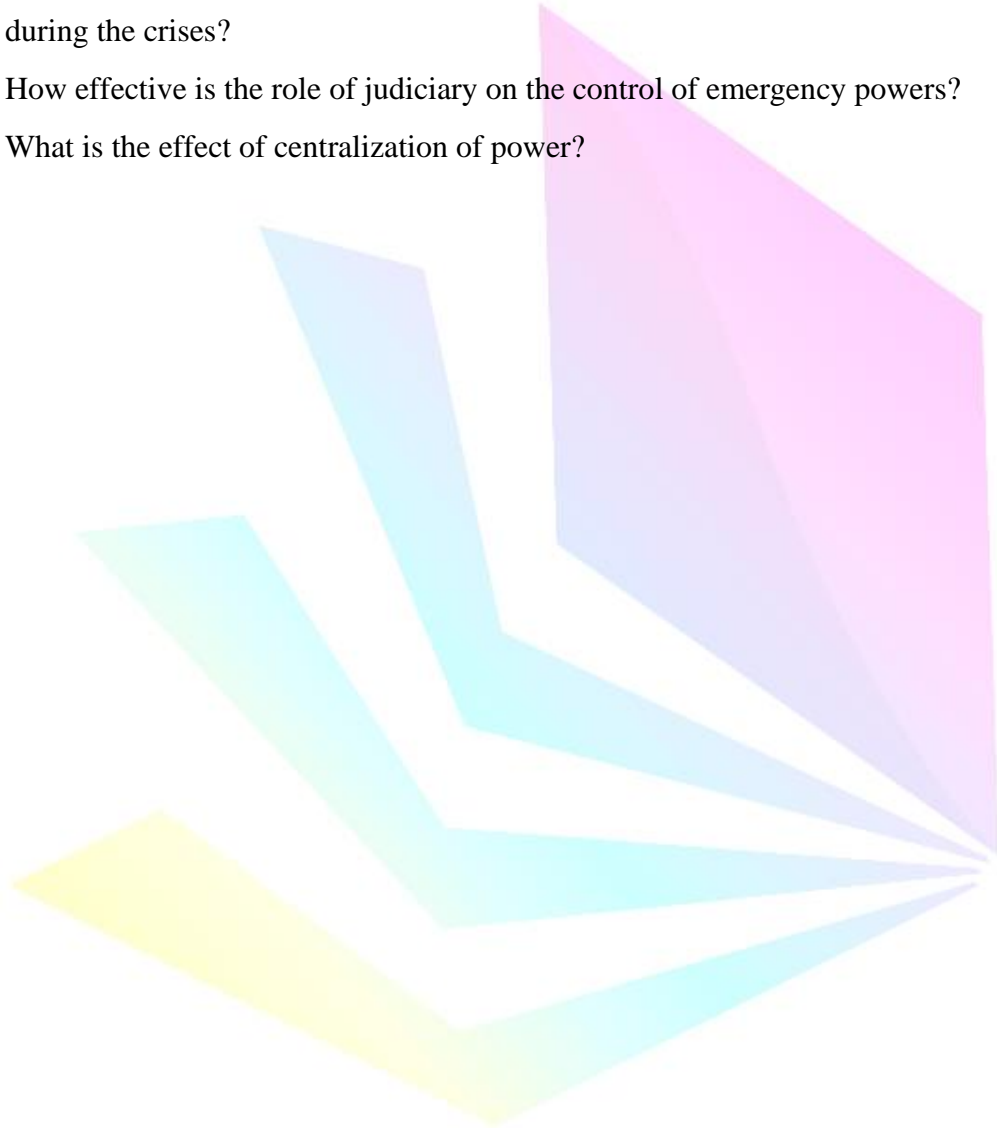
- To analyze the concept of emergency power
- To bring out the circumstances under which emergency is proclaimed
- To examine the impact on the fundamental rights
- To examine the instances where the courts have played their effective role

OBJECTIVES OF THE STUDY

- Discusses the evolution of emergency powers
- Brings out the international standards on emergency powers
- Examines the role of courts on emergency powers – a comparative analysis of India & US

RESEARCH QUESTIONS

- How the grant of powers during emergency is balanced with the derogation of fundamental rights?
- Whether the courts can deal with the validity of proclamation of emergency powers during the crises?
- How effective is the role of judiciary on the control of emergency powers?
- What is the effect of centralization of power?



HISTORY - ROMAN DICTATORSHIP

The state of emergency originates from the Roman republic and the Greek city states. The Romans used to follow this system whenever they felt there was a need for the dictatorship when the internal order of the Republic was seriously affected. For most of the modern forms of constitutions the Roman dictatorship institution is regarded as the prototype to incorporate relevant emergency power provisions.

“The constitutional basis for the Roman dictatorship was made up of four components:

- i) The appointment of a high-ranking citizen as dictator made in accordance with well-defined constitutional procedures;
- ii) The declaration of the dictatorship by other officeholders in the government, and not by the dictator himself;
- iii) The period of the dictatorship being limited to the time it took for its purpose to be achieved or, at the most, six months;
- iv) The purpose of the dictatorship being stated to be solely to enable the dictator to devote his time and efforts to defend the Republic.”ⁱⁱ

In the Roman Republic these elements comprised the fundamental protected limits that managed the manner in which the dictator practiced his forces. The dictator was replaced by the Commissar during the Middle Ages, after the fall of the Roman Republic. In contrast to the Roman dictator, whose capacity was to protect the constitutional order and the Republic, the Commissar's principal work was rather to shield and fortify the dictatorial standard of the sovereign or ruler. The Commissars were named by rulers as their own workers and were normally given extreme powers to intercede during crises to protect the current lawful order instead of the constitutional order. The Commissars in this manner addressed the absolute opposite of the constitution intended dictatorship. CJ. Friedrich proposes that “the Roman fascism could be alluded to as limited constitutional dictatorship, whilst the dictatorship of the absolute monarchs could be called an unlimited unconstitutional dictatorship”.ⁱⁱⁱ The rise of the governments under the constitutional order and the fall of the absolute monarchs, in the

eighteenth century, have prompted the modern type of constitutions to grant emergency powers of as indicated by characterized protected standards.

INTERNATIONAL CONVENTIONS ON EMERGENCY POWERS

The most important universal instrument regarding human rights is the International Covenant on Civil and Political Rights (ICCPR), 1966, currently with 173 state parties. India ratified this treaty in 1979. This multilateral treaty endeavors to find some kind of harmony between ensuring public interests and securing individual rights during a crisis. It allows states parties to discredit from their commitment to authorize the rights identified in the ICCPR during a crisis and therefore subject such criticism systems to the administration of two substantive standards, namely principle of proportionality and non-derogation.

In 1984, the International Law Association in its Paris conference said: “It is neither alluring nor conceivable to specify in dynamic to what specific sort or kinds of occasions will consequently establish a public crisis inside the significance of the term; each case must be decided on its own benefits considering the abrogating worry for the duration of a popularity based society.”^{iv} Despite this, the United Nations Commission on Human Rights tried to sum up few of the conditions under which a state of emergency situation has been proclaimed in municipal law as: “International conflict, war, invasion, defense or security of the state or parts of the country; civil war, rebellion, insurrection, subversion, or harmful activities of counter-revolutionary elements; disturbances of peace, public order or safety; danger to the constitution and authorities created by it; natural or public calamity or disaster; danger to the economic life of the country or parts of it; maintenance of essential supplies and services for the community.”^v

Under Article 40 of the ICCPR, the Human Rights Committee (HRC) is assigned with the obligation regarding guaranteeing consistence with the previously mentioned considerable standards through the survey of occasional reports from state parties. Notwithstanding, the HRC's capability as a revealing system has been seriously hampered because of considerable

deferrals in the assortment of essential data. For states have frequently avoided documenting reports under Article 40 inside and out or contain no relevant information. Although the HRC can request additional information concerning the derogating measures from states representatives during the survey of reports as valuable reports, such demands have frequently gone unnoticed, also. Besides, reports under Article 40 have likewise uncovered that state parties have either abstained from submitting notification of derogation under Article 4(3) totally, or submitted such notification 'weeks or even a long time after the announcement of the emergency or filled notification that were so ambiguous as to make no effort to demonstrate the nature and extent of the derogation really turned to... or to show that such derogations were very much essential. These institutional limits have additionally implied that state parties during crises have regularly figured out how to abuse the guidelines concerning basic liberties, as cherished in the ICCPR, without any potential repercussions.

In this manner, the shortcoming of the global deal-based checking framework requires the execution of the worldwide guidelines concerning basic liberties, like the standard of non-discrediting, inside the sacred structure of each country. In any case, the simple fuse of rights inside a constitution isn't adequate to forestall their maltreatment during crises. Or maybe, a rundown of rights ought to be supplemented by the accompanying elaborate instruments contained in the constitution for forestalling the maltreatment of rights during announced times of crises:

- a) Restricting the ability to proclaim an emergency to conditions which really achieve a specific level of gravity and puts the existence of the country and its subjects under genuine danger;
- b) Entrusting the justly chosen governing body, through the device of “supermajoritarian escalator”^{vi}, with the obligation of guaranteeing compelling examination of a highly sensitive situation; and
- c) Accommodating a general time limit on the continuation of a highly sensitive situation.

The consideration of the previously mentioned shields in a constitution will guarantee that the crises are not depended on and proceeded for forcing subjective limitations on fundamental rights.



Emergency Provisions in India

Who can declare a state of emergency?	The president, acting on the binding advice of the union cabinet, communicated in writing (article 352.3). In effect, the prime minister is the key decision-maker.
Under what conditions?	'If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion' (article 352). 'A proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof' (article 352.1).
Legislative approval rules	A proclamation of emergency must be approved (post-declaration approval) by 'a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting' (article 352.6).
Time limits and renewal	<p>A proclamation of emergency shall 'cease to operate at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament' (article 352.4).</p> <p>A proclamation of emergency approved by Parliament shall 'unless revoked, cease to operate on the expiration of a period of six months' from the date of approval, but may be extended by a resolution of both Houses for additional 6-month periods (article 352.5).</p>
Restrictions on rights	While a proclamation of emergency is in effect, Parliament or the state legislatures may make laws that would otherwise be incompatible with article 19 (which defines civil liberties such as freedom of speech, assembly and association). Such laws cease to have effect when the proclamation expires.
Allocation of powers	'Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List' (article 250). Such laws remain in force for no longer than 6 months after the emergency proclamation ceases to be in effect. When a proclamation of emergency is in effect, 'the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised' (article 353).
Delaying elections	'...while a Proclamation of Emergency is in operation', Parliament's term of office may 'be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate' (article 83).

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EMERGENCY POWERS AND COURTS IN INDIA AND US

The Centralization of powers that comes into force during the application of Emergency is something that is debated when a Federal country declares an Emergency. India and the United States both are Federal, though one more than the other. While India is considered to be a unitary Government, with certain federal aspects, the United States is more federal in nature, with certain unitary aspects. However still, the Federal structure of both these countries is called into question when an Emergency is proclaimed.

With regards to the Emergency provisions themselves as well, the situation in India and the USA is also different. While in India, an Emergency can be proclaimed on a limited grounds that are enumerated under Articles 352, 356, and 360 of the Constitution (With an Emergency under Article 360 never proclaimed till date), the same is not the case with USA, as there are a greater number of grounds, including grounds such as natural disasters, epidemics, etc., on the basis of which emergencies can be proclaimed. However, this does not mean that the number of grounds of Emergency is directly proportional to the limitation of rights of the people, as that is a separate issue altogether.

India has broadly three different types of Emergencies: The National Emergency under Article 352 of the Constitution; the State Emergency on account of breakdown of Constitutional machinery under Article 356; and Financial Emergency under Article 360. For the purposes of this Paper, the National Emergency would be taken into regard mainly, as the question of derogation of Fundamental Rights, as well as the truffle of judiciary and Executive with regards to judicial review is the most prominent in that one.

EMERGENCY AND FUNDAMENTAL RIGHTS

The provisions for State of Emergency were introduced in the jurisprudence of both these nations with the assumption that the Government, or the President, as the case may be, would initiate the Emergency and take the necessary steps thereon for the best interests of the country and its citizens. The Emergencies were never meant to curtail freedom, if we look at the idea

behind them, but rather, they were a means to ensure that in case situations arose wherein the security of nation, or the Government, or the people were to be maintained, the procedural requirements would be curtailed so that the State may deal with the situation accordingly. However, this idea was not always implemented with the best interests of the State, and that is where the role of the judiciary comes in i.e. to keep a check on the powers of the Legislation and the Executive.

In India, a timeline can be established with regards to the jurisprudence on Emergency as pre-1975, and post 1975, as the question of Fundamental Rights was raised mainly only during this Emergency. The Emergency imposed by the State during the 1962 Indo – China War, and the 1971 India – Pakistan War were emergencies on account of War, and therefore, the Fundamental Rights of the citizens inside the country did not suffer as much as what had happened during the 1975 – 1977, wherein the Emergency was declared by the then Indira Gandhi Government on account of “Internal Disturbance”. What amounted to internal disturbances, and the threshold required to initiate the Emergency had not been defined in the Constitution, and thus, the provision was privy to misuse by the Government that was in power. However, after the fall of the Indira Gandhi Government in the year 1977, through the 44th Constitutional (Amendment) Act, the words “internal disturbance” was replaced with “armed rebellion”, so as to curtail the misuse of the provision.

The USA, in spite of bringing into force more than 60 Emergencies, has as opposed to India, not violated the rights of its citizens as much, with only a few exceptions such as during the Civil War, the 1st and the 2nd World War, etc. Even then, the violations were not grave in nature, and were neither widespread, but rather, were only limited to certain jurisdictions. However, that does not mean that the President (Or the Congress) does not have the power to curtail these rights. For example, in the National Emergencies Act of 1976,^{viii} gives the President powers contained in as much as 123 statutory provisions, which range from the military, to public contracts, to exports, etc. The President may stop all types of electronic communication, or even freeze the bank accounts of the citizens of the country.^{ix} Thus, this indicates the far-reaching aspects of Emergency Law in case the authorities want to abuse it.

Under the Constitution of the United States, the Congress has the power to suspend the writ of Habeas Corpus “when in Cases of Rebellion or Invasion the public Safety may require it” and “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”^x

A. *The Writ of Habeas Corpus*

The writ of Habeas Corpus is perhaps the most important right of a citizen of a country, especially in times of Emergency. This is also the writ that is suspended the most during the time of Emergency as through this Writ, a detained / arrested person can approach the Court on grounds of illegal detention / arrests.

Prior to the 44th Amendment of the Constitution of India, with the invocation of Emergency in India, all the Fundamental Rights enshrined under Part III of the Constitution of India were suspended automatically, with Article 20 and 21 also eligible to be suspended if so ordered by the President of India. In the 1975 Emergency, the President of India did suspend the operation of Articles 20 and 21 of the Constitution as well, thereby paving the way of arbitrary arrests of thousands of people across the country.

One major landmark (As well as controversial) case with regards to the suspension of the writ of Habeas Corpus in the US is the case of *Ex parte Merryman*.^{xi} During the Civil War in the 19th Century in the United States, the then President Mr. Abraham Lincoln had unilaterally suspended Habeas Corpus in Maryland, following which, a number of people, including a Congressman, police officials, Mayor, Police Chief, etc. of Baltimore were imprisoned indefinitely without trial. In this decision, the Court had ruled the order as Unconstitutional, and declared that the President did not have the power to suspend the operation of the Writ of Habeas Corpus, and that only the Congress was equipped with power.

However, with regards to Fundamental Rights, it is seen that the Congress does hold the power of suspend the writ of Habeas Corpus, which happened after the attack on Pearl Harbour during the second World War as well.

In India, in the landmark case of *ADM Jabalpur v. Shivkant Shukla*^{xii}, by a decision of 4 : 1, the Supreme Court of India opined that “*in the view of the presidential order dated June 27th, 1975 no person has any locus standi to move any writ petition under article 226 before a high court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous consideration.*” Therefore, in simple terms, the Supreme Court declared that no writ petition could have been filed by anyone whose rights were violated by the Government, as long as such rights were suspended (In this case, the rights were suspended through an order of the President of India dated June 27, 1975). This amounted to a blow to personal liberties in India, as during that phase of the emergencies, the ruling Government were committing widespread human rights violations, as well as arbitrary arrests and detains of its political opponents. The decision of the Supreme Court in *ADM Jabalpur* essentially stated that during Emergency, the citizens would have no remedy against right violations.

ROLE OF JUDICIARY DURING EMERGENCY

The role of judiciary is of paramount importance in any democracy. This integral role of the institution of judiciary gets ever more important during the times of Emergency. As had been seen in India during the 1975 Emergency, widespread human rights and personal liberty violations had taken place all over the country. It was the legislature and the executive that was responsible for these violations, and therefore, the citizens of the country turned to the judiciary for the exercise of their rights. Similarly, the forefathers of the Constitution of both the countries in question i.e. India and the United States, as well as majority of the democratic countries, have given immense power to the judiciary so as to keep a check on the legislative and the executive.

While the power of judicial review has not been explicitly given in the US Constitution, the landmark case of *Marbury v. Madison*^{xiii}, established the important principle in the USA.

In India, for National Emergency to be proclaimed, the Constitution requires that if the President is satisfied over the circumstances present, he may proclaim emergency. Meaning thereby that the Emergency is proclaimed at the satisfaction of the President of India who in turn works on the aid and advice of the council of ministers. The question with regard to judicial review that arises herein is whether the satisfaction of the President may come under challenge in a court of Law.

The Hon'ble Supreme Court in *Bhut Nath v. State of West Bengal*^{xiv} stated that the issue of declaring an emergency as void is political in nature, and not judicial. The Kerala High Court then in the case of *K.K. Aboo v. Union of India*^{xv} held that it was not open to the Court to question the satisfaction of the President on matter of national emergency. However, change happened in the case of *Minerva Mills and others v. Union of India*^{xvi}, wherein Justice Bhagwati of the Hon'ble Supreme Court, raised question as to whether or not the President had applied his mind, and whether or not such proclamation could be excluded from the purview of judicial review. Then, in *S.R. Bommai v. Union of India*^{xvii} gave more weightage to the view in *Minerva Mills* wherein the Court held that the Courts can "strike down the proclamation if it is found to be malafide or based on totally irrelevant or extraneous grounds."

However, one pertinent point herein is that both *Minerva Mills* and *S.R. Bommai* were decisions with regards to Article 356 of the Constitution, and not 352. Therefore, in this regard, it is not wholly clear if the same standard will also be made applicable for President's proclamation of Emergency under Article 352.

During the Second World War, after the attack on Pearl Harbour in the United States, habeas corpus was suspended in the State of Hawaii and martial law was made applicable. Under this law, even civilians were tried in military courts. In the United States Supreme Court Case of *Duncan v. Kahanamoku*^{xviii}, was a decision wherein the Petitioner had appealed to the Court on account of his conviction made by a Military Court, in spite of the offence being civil in nature. The Supreme Court held the Act as unconstitutional and stated that the conviction by a military Court was unconstitutional. Similarly, as we saw in the case of *Ex parte Merryman*^{xix}. The Court had ruled the order of suspension of Habeas Corpus as Unconstitutional, and

declared that the President did not have the power to suspend the operation of the Writ of Habeas Corpus, and that only the Congress was equipped with power.

Thereafter, during the First World War, the Espionage Act of 1917 was passed in the US, that greatly curtailed the first amendment of the Constitution i.e. free speech. In the case of *Schenck v. United States*^{xx}, the “Clear and Present Danger” test was laid down that differentiated times of war with ordinary times, thereby creating a balance.

Thus, the role of judiciary in this regard is of paramount importance so as to keep a check on the misuse of the emergency provisions.

EFFECT OF PROCLAMATION OF EMERGENCY AND CENTRALIZATION OF POWERS

With regards to the Centralization of Powers, the power with the Union Government in India under Article 356 of the Constitution is vast, and opposed to the basic principles of federalism. The federal structure of India also takes a hit with the proclamation of national emergency under Article 352. The Law-making powers of the Parliament of India (Central Government) and State Legislatures have been delineated under Schedule VII of the Constitution, wherein 3 lists, namely, Union, State, and Concurrent, have been provided based on which only can the Legislation make laws. However, during Emergency, the Central Government has the power to even frame laws that have been given under the State List.

In the United States, the President of the country also has wide powers during an Emergency, if he so wants to use them. While under the Constitution, it is the Congress that finds mention in the majority of provisions, it has been interpreted by several Presidents that even the President, as head of the Executive, as well as the Commander – in – Chief of the armed forces have several inherent powers.

CONCLUSION

Therefore, to sum up what has been detailed above, the powers of Emergency with a Government are extraordinary powers, wherein, if they so want, they may take away the basic fundamental rights that have been granted to the people. While since the beginning of the 20th Century till now, the jurisprudence in this regard has evolved manifold, so as to increase the judicial review in these cases, however still, the powers under emergency are wide enough for the Governments to use them to their mala fide advantage, if they so want.

Analyzing the stance of India, as has been stated above, for the purposes of the analysis of the jurisprudence with regards to Emergency provisions in India, the timeline can be set as the pre 1975 Emergency, and post 1975 Emergency. The Declaration made by the President of India on June 27, 1975, whereby the application of Articles 20 and 21 of the Constitution were suspended was a turning point in India's democracy. What followed next were gross human rights violation, however, in this time of darkness of the Indian democracy, the judiciary did not stand by it, and instead ruled in favor of the Government in the ADM Jabalpur Case. However, after this judgment, the stance was corrected by the 44th Constitutional Amendment, wherein now Articles 20 and 21 of the Constitution cannot be suspended.

In the United States, emergency powers with the President of the country are wide. As stated above, only under the Emergencies Act of 1976, there are approximately 123 statutory provisions under which the President can take decisions, which may curtail rights of the citizens as well. However still, as has been seen in a catena of judgments, the National emergencies Act is a statutory legislation, and thus, if it grossly violates the human rights of the people, through the power of judicial review, a balance would be sought to be maintained.

Judicial review is perhaps one of the most important tools present in a democracy. However, in that regard, it puts a huge pressure on the judiciary as well, as they become the last pillar of the democracy in case the rights of the people are in danger. What happened in the ADM Jabalpur case, if happens again, and a precedent is set, would go against the rights of the people. However, in that regard, the decision of the Court shall also be binding on the parties, as the power of judicial review may even work against the interests of the people. To conclude, the

Courts of both the countries analyzed i.e. India and United State, have largely sought to maintain a balance between the extended rights of the Government during Emergencies, and the rights of the people.

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