

A COMPARATIVE ANALYSIS OF THE USE OF EMERGENCY POWERS IN THE UNITED STATES OF AMERICA (“U.S.”) AND INDIA

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ABSTRACT

In theory, emergency powers refer to those intrinsic powers that a State can exercise in unusual circumstances such as war, armed rebellion, attacks of terrorism, natural disasters, serious health emergencies, pandemics, or other serious threats that threaten the State. It is widely acknowledged that these powers should be utilised only in extreme situations and to the degree that the situation necessitates.

Emergency has two significant problems: (1) the balance of powers between the Government and its branches is disturbed, and (2) the protection of human rights and the law of governance is threatened.

History has provided us with dark examples which show how the exercise of emergency powers has resulted in abuse of authority and power. Arbitrary exercise of emergency powers has catastrophic consequences on a nation's legal, political, and economic growth. It's crucial to remember that emergency powers should never be used to stifle dissent or impose arbitrary restrictions on human rights.

The Researcher acknowledges that the exercise of emergency powers in response to severe threats is essential and permitted by national and international law during severe crises. Nevertheless, what is pertinent to note is that any emergency reaction must be reasonable, necessary, and non-discriminatory.

The Research Paper starts with an introduction describing the concept of “emergency powers”. The second section provides a broad overview of the existing emergency provisions in the U.S. and India. The third section highlights the emergency approaches practised and incidents in the past in both States. The fourth part will focus on the comparative analysis of the procedural aspects of the respective governments exercising their emergency power as per their constitutions. Lastly, the Research Paper is concluded with specific observations and concerns identified by the researcher.

INTRODUCTION

In a nutshell, an emergency is the partial or complete suspension of a State's regular legal system, aided by increasing government power and consequently restricting individual rights and transferring authority between government branches. This leads to the blurring of distinctions between the political branches, granting the Executive powers over legislation and judiciary.

It is commonly acknowledged that nations are currently confronted with many critical (and partially novel) threats and crises, including pandemics, attacks of terrorism and large-scale immigration. Since few of these threats are comparatively newer, several states are ill-equipped or have no idea of handling such complex and unexpected situations. As a result, in such circumstances, the instinct to use emergency powers — that is, to award the government exceptional powers outside its regular constitutional duty has become natural.

Emergency provisions are used to ensure that a state can continue to exist and fulfil its legal commitments in the future. However, declaring a state of emergency has a price. Emergency powers have often imposed restraints on individual human rights in the past, and although designed to ensure the state's existence, such broad executive powers have threatened democracy's survival.

It might be interesting to note that the term "emergency" does not appear in the U. S Constitution, nor does any other similar phrase or terms. Nevertheless, the founding fathers

had undoubtedly contemplated how to handle “emergencies” and had crafted a constitution that would enable the government to do so efficiently. This is evident in two ways: (1) delegation of power over specific duties explicitly related to emergencies, and (2) express exclusions to general rules based on the occurrence of such emergencies. The U.S National Emergencies Act 1976 is the guiding legislation that provides for the President's emergency powers and states how any existing national emergencies may be terminated.

In India, the constitution's emergency provisions require the central government to adopt the powers of a unitary government if the crisis necessitates it. The President may declare a state of emergency once the Upper and Lower Houses of the Parliament have passed the emergency resolution. During one of the Constituent Assembly debates, Dr. B.R. Ambedkar claimed that the Indian Federation was unusual and could transform itself into a unified structure at times of need. He also stressed that all peaceful ways should be explored in such dire situations, and emergency should be the final resort because it would otherwise threaten India's federal structure.

EMERGENCY PROVISIONS UNDER THE U.S. CONSTITUTION

The U.S. Constitution empowers the Congress with vast powers over war and other military engagements, which can be broadly divided into three categories: (a) declaring war; (b) maintaining armed and naval forces through appropriate rules and regulations; and (c) invoking the militia for carrying out laws, suppressing insurgencies and resisting invasions.

The President is granted executive powers that designate him as the Commander in Chief of the air and naval forces, as well as the militia when summoned into active federal duty, and invests him with such other powers, necessary for ensuring the laws and order.

The "guaranty clause" under the U.S. Constitution requires the federal government to not only guarantee a republican system of government to each state but also to safeguard it against invasion and domestic violence.

The National Emergencies Act 1976 (“**U.S. Emergency Act**”) It allows the President to activate the law's emergency provisions by issuing an emergency proclamation on the condition that the President defines the provisions triggered and informs Congress. The U.S. Emergency Act's powers have been confined to the 136 emergency powers that Congress has outlined in the law.

Emergency in the U.S. would end if the President explicitly ends the emergency, or if the emergency had not been extended regularly or if each house of Congress had passed the resolution dissolving the emergency. President has to sign a joint resolution agreed by both bodies, giving the president veto authority over the termination. In the event of a contested termination of both houses, a two-thirds vote is required.

HISTORY OF EMERGENCY IN THE U.S.

In 1861 President Abraham Lincoln's suspension of the writ of habeas corpus without Congressional consent led to the claim of emergency powers. President Abraham Lincoln argued that the 'Confederate Rebellion' posed an emergency, giving him the extraordinary ability to suspend the writ of *habeas corpus* immediately. The Federal District Court of Maryland, knocked down the suspension in *Ex Parte Merryman*, notwithstanding Lincoln's defiance of the order. President Franklin D. Roosevelt in 1933 declared National Emergency due to the financial crisis and banned the personal amassment of gold.

During the Korean War of 1950, President Harry Truman proclaimed a National Emergency due to communism. When private steel mills were unable to manufacture steel due to the worker strikes in 1952, President Harry Truman extended the emergency and took control of several steel mills citing the private production of steel as an essential commodity to conduct war.

In 1970 due to the postal workers' strike, President Nixon proclaimed a National Emergency. In 1971, President Richard Nixon declared a national emergency and levied an interim

import tariff to reinforce the United States' foreign economic involvement and combat inflation.

In reaction to the four declared national crises, the U.S. Emergencies Act was enacted and adopted by Congress. However, U.S. changed its approach to emergency powers drastically in response to the 9/11 attacks which acted as a catalyst, prompting President George W. Bush to declare a state of emergency and the Congress to pass a joint declaration authorising the President to use any force necessary against individuals or bodies that were involved in this act of terrorism.

Following this, dozens of new laws and policy decisions were adopted, most notable of which was the U.S. Patriots Act, which was enacted as an immediate response to the 9/11 attacks. This Law enables competent authorities to conduct surveillance to combat acts that may be linked to terrorism. It also allowed federal investigators to get bank and corporate information on selected suspects after obtaining approval from a federal court. Although that many individuals supported the law, many others opposed it since it infringed fundamental rights and resulted in unnecessary harassment of immigrants. Thus, whether the Act was efficient in combating terrorism may be a matter of personal opinion.

EMERGENCY PROVISIONS UNDER THE INDIAN CONSTITUTION

Articles 352 to 360 of Part XVIII of the Indian Constitution deal with the provisions of the Emergency. The Indian Constitution enables the President of India to declare national emergency, state emergency and financial emergency.

Declaration of Emergency is required to be approved by the Lok Sabha and the Rajya Sabha within one (1) month from the date of its issuance. If both the houses, approved the emergency it continues for a period of six (6) months and can be further extended to an unspecified period for every six (6) months. Of course, with the approval of the Parliament. Every resolution approving emergency or its continuance has to be passed by either House of Parliament. In both instances a special majority is required. However, Emergency can be

terminated if the Lok Sabha passes a resolution by a simple majority. Further, the President can terminate the Emergency at any time by a subsequent proclamation. This does not need ratification from the Parliament.

Emergencies have severe effects on the political, legal and economic system of a State. During an Emergency centre has the authority to give all executive orders and directions to the states and the parliament, is empowered to make legislation for the states. Further, the President has the power to issue ordinances when the parliament is not in function. With regards to financial powers, the President is empowered to alter the revenue distribution between centre and the states.

During Emergency the fundamental rights under Article 19 of the Indian Constitution get suspended instantaneously and the same is revived as soon as the Emergency ends. The Constitution (Forty-fourth Amendment) Act, 1978 states the grounds on which Article 19 can be suspended. Further, the President is empowered to suspend the enforcement of Fundamental Rights during a National Emergency.

HISTORY OF EMERGENCY IN INDIA

In India, National Emergency has been declared three times to date. During the Indo-China War in October 1962, the First Emergency was declared and was in effect until January 1968. President Shri. Sarvepalli Radhakrishnan enforced the emergency due to the Chinese invasion in Arunachal Pradesh, with external aggression serving as the justification.

During the Indo-Pak conflict in 1971, the Second Emergency was declared and it lasted until 1977. President Mr. V.V. Giri declared the Emergency due to the war in Bangladesh and the reason for claiming it was external aggression.

The Third Emergency was introduced in 1975 when the Second Emergency was still in effect. The Third Emergency was declared in response to a crisis in the central government and the underlying reason was essentially to guard the seat of Mrs Indira Nehru Gandhi, who

was the Prime Minister of India. The Allahabad High Court held that Indira Gandhi was guilty of certain illicit acts during her campaign for the seat of Raebareli. Indira Gandhi was against the Allahabad High Court's judgement which banned her from contesting elections for 6 years and also asked her to relieve her post of the Prime Minister of India. Indira Gandhi then came up with a shocking strategy, as part of which, President Fakhruddin Ali Ahmed was asked to proclaim the Third National Emergency a day prior to the appeal-hearing of the Supreme Court for the case of *Raj Narain v. State of Uttar Pradesh*. "Internal disturbance" was cited as justification for proclaiming Emergency and was ratified by Parliament.

The Emergency of 1975 appears to be a dark period in the Indian Constitution's history and Indian Democracy. The political, legal and economic situation was terrible. Military and police officers constantly disregarded government instructions. Violence and unrest erupted as a result of a conflict between the central government, the opposition, and the citizens.

The Fundamental Rights under Article 14 and Article 21 were suspended during the Emergency, as were all processes relating to the enforcement of these Articles. Anyone who posed a political threat was detained as a preventive measure. Many politicians were detained under the *Maintenance of Internal Security Act of 1971* for allegedly posing a political danger to the country. The right to freedom of press was suspended, and *Indian Raj Censorship* was declared, requiring publications to seek permission from the Government before publishing. Provision of *Habeas Corpus* was disregarded, thereby nullifying people's rights under Article 21 of the Indian Constitution.

The *42nd Constitutional Amendment Act of 1976* exempted the elections of the Prime Minister, President, and Vice-President from judicial approval or review. As a result of the relationship between the judiciary and the legislature drastically deteriorated.

COMPARATIVE ANALYSIS OF THE EMERGENCY PROVISIONS OF THE U.S. AND INDIA

The U.S. and India are two different types of States, each with its own set of laws and procedures. In their respective continents, North America and Asia, they are regarded as model democratic governments. It is noteworthy to discuss and compare how emergency laws fit into the democratic norms of these States.

In the U. S., Courts have the authority to judge whether an emergency direction is warranted or not, even during emergencies like wars. In *Hirabayashi v. U.S.*, the court supported some laws that imposed certain restrictions on persons of Japanese heritage in the United States, such as requiring them to stay in their homes during particular hours to avoid any acts of espionage. Further, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court ruled that none of the President's emergency powers gave him the ability to confiscate private property without the approval of Congress. However, in India, emergency actions and directions are not open to courts approval as they are dependent on the central executive who declares an emergency. The Constitution itself deals with the repercussions of such situations, and there is no reliance on the court or its interpretation.

Furthermore, the term "emergency" is not mentioned in the U.S. Constitution, and the laws and regulations for dealing with an emergency are supplied indirectly in Articles I, II and IV. In India, Articles 352 to 360 of Part XVIII of the Indian Constitution expressly mentions emergency provisions.

India has national and state emergencies, whereas the U.S. has national and financial emergencies, the latter of which are similar to India.

Both the nations' constitutions have the ability to quickly transition from federal to unitary states in the event of a national emergency. In a true federal state, both the centre and the states are considered equal when it comes to the distribution of powers and functions, but in the case of a national emergency, the centre assumes the majority of powers and functions because the centre is usually given the responsibility to protect the country in a threat or crisis.

CONCLUSION

According to John Locke, revolt against the state was considered to be legitimate if it encroached on the liberties it was essentially established to preserve. Furthermore, Locke argued that emergency declarations should not be used as a pretext for any form of oppressive action, nor should they be used to suppress human rights activists.

It is natural that from time to time, tension and crisis shall arise. Even with protections in place, there is still the possibility of such laws being abused. India's and U.S.' constitutions may indeed borrow provisions from each other to enhance their respective circumstances, particularly when it comes to national emergencies. For instance, India's judiciary may be strengthened under emergencies, similar to the U.S, where judges are in a far better position to assess the justice ability of emergency actions. In India by the time the Court conducts its own assessment of the constitutionality of a particular emergency action, the storm would have already passed. It's difficult, if not impossible, to find an example of court interference preventing emergency responses or declarations in India. Similarly, the U.S. might consider making its emergency provisions more precise, by the inclusion of clear measures dealing with emergencies.