JUSTICIABILITY OF A PRESIDENTIAL PROCLAMATION OF EMERGENCY UNDER ARTICLE 352(1) OF THE CONSTITUTION

VIDUSHI SANGHADIA*

ABSTRACT

The nature of emergency powers granted to the President under Article 352 and under Article 356 of the Constitution of India varies greatly in scope, implications, and manner of invocation, among others. Therefore, the judicial review for both actions is required to be differently made. However, judicial decisions have had the effect of conflating the standard of review for proclamations issued under Article 356 with that issued under Article 352, resulting in a two-stage review process for proclamations issued under Article 352 – first, on the material on which such proclamation was issued, and second, on legislations passed pursuant to the proclamation of national emergency. The question that arises is of creating a balance between establishing a check on the executive's powers to protect against the threat of abuse, and of prudent judicial restraint in a sphere that requires highly political assessments to be made. The paper seeks to analyse whether or not such a position is best-suited for a democracy like India pursuant to a comparative analysis made with the American and Canadian approaches.

* The author is a 4th Year B.A. LL.B. (Hons.) student at the National Academy of Legal Studies and Research, Hyderabad.

I. INTRODUCTION

There often occur abnormal situations that threaten a country on numerous fronts including war, economic or financial breakdown, or aggression from within the country, and require extraordinary responses to address them in order to ensure the continuation of governance in accordance with the constitution. Various constitutions around the world provide for emergency provisions to address such situations. Traditionally, the invocation of emergency powers facilitate a departure from the ordinary functioning of the organs of state. They are extremely important but also dangerous, for they potentially provide scope for the obliteration of the constitutional order.

Across the world, states of emergency have garnered attention on account of their impact on protection and enforceability of human rights,[1] the proliferation of emergency regimes of questionable provenance and prolonged, institutionalised states of emergency.[2]

The Indian Constitution provides for Emergency Powers under Part XVIII, to be invoked in cases of a security threat due to war or external aggression or armed rebellion or an imminent threat thereof,[3] financial emergency, or a failure of constitutional machinery in the state.[4] The power to proclaim the state of emergency vests with the President. The Centre has overriding powers to control and directs all aspects of administration and legislation throughout the country. However, the Constitution (Forty-Fourth Amendment) Act was enacted in 1978 to provide for safeguards against the arbitrary exercise of power akin to that exercised in June 1975.

The proclamations invoking the emergencies are based on the President's satisfaction, which is not his personal satisfaction, but that supplemented by the recommendations of the Cabinet Ministers headed by the Prime Minister. The issue of justiciability of the proclamation has been widely contested, and addressed by the courts in various decisions.

It has come to be held through a series of decisions which shall be further discussed, that a presidential proclamation issued under Article 356(1) is amenable to the jurisdiction of

---

[1] Scott P. Sheeran, *Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 Michigan Journal of International Law 491 (2013).; Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/1997/19 (23 June, 1997).
[2] Commission on Human Rights, U.N. Doc.E/CN.4/Sub.2/1993/23 (23 June, 1997).
[3] Article 352, Constitution of India.
[4] Article 356, Constitution of India.

courts on limited grounds.[5] The implications of the position enunciated by the court in later decisions, most recently that of *Rameshwar Prasad (VI) v. Union of India*,[6] where it was observed that the grounds of review of a presidential proclamation issued under Article 356(1) of the Constitution shall extend to review of the proclamation issued under Article 352(1) as well, shall be discussed. It has been held that judicial review as part of the basic structure of the Constitution[7] cannot be wholly excluded. Therefore, the material based on which the presidential proclamation invoking national emergency in the face of war, external aggression or armed attack has been made amenable to judicial review on limited grounds. These include – whether there was any material upon which the president based his satisfaction, whether the President acted *mala fide* and whether the power exercised was *ultra vires.*

The difficulty that arises with this position is the direct conflation of the grounds of review of a proclamation issued under Article 356 with that of a proclamation issued under Article 352. As shall be discussed, the nature of the emergencies are at variance from each other, and so are their effects and their procedure. They are also invoked in different contexts which require different kinds of political assessments to be made, which have been vested with the Union executive's judgement by the Constitution. The competing consideration to preventing the courts' interference into a matter which is to be solely decided based on subjective political considerations left to the wisdom of the executive, is that of a misuse of emergency powers by the executive, which India has been witness to in the past. There is a reliance placed on constitutional values and constitutional supremacy, and the principle of rule of law. However, this conflation has been criticised and supported from different perspectives.

Part II of the paper shall discuss the scheme of emergency powers within the Indian constitution, after which Part III shall lay down the trajectory of judicial interpretation through various decisions. After arriving at the present position of law, Part IV will adopt a brief comparative perspective with respect to the exercise of emergency powers in the United States and Canada. Part V concludes with the acknowledgement of the debate and the requirement of establishing a balance between the protection and promotion of the rule of law and constitutionality on the one hand, and of a workable doctrine of separation of powers and

[5] S. R. Bommai v. Union of India AIR 1994 SC 1918.
[6] AIR 2006 SC 980.
[7] Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.

of executive wisdom in times of crisis. Not much literature exists on the debate discussed in the present paper, that is, of the parity of standards of review. However, the author has surveyed other literature for the strands of argument concerning the rule of law, emergency excesses and judicial review.

II. SCHEME OF EMERGENCY POWERS

Article 356(1) provides that the President, on receipt of a report from the Governor of the state or otherwise, if satisfied that a situation has so arisen whereby the government of a state cannot carry out its functions in accordance with the provisions of the Constitution, may issue a proclamation to suspend the government and assume the position of the Governor of the state,[8] part the functions of the legislature of the state to the Parliament,[9] or carry out any such actions which may in his prudence be best suited for giving effect to the objects of the proclamation.[10]

In comparison, a proclamation of emergency under Article 352(1) may be issued by the President if he is satisfied that a grave situation exists whereby the security of India or any part thereof is threatened by external aggression or war or armed rebellion.[11] Such a proclamation may be made even before the actual occurrence of the abovementioned situations, if the President is satisfied regarding an imminent danger thereof.[12] Proclamations passed due to failure of constitutional machinery in a state cease to be operative after two months, unless they have been approved by both Houses of Parliament before expiration of the same.[13] On approval, a proclamation continues to be in operation for a period of six months.[14] A proclamation of national emergency ceases to operate a month after its issuance unless approved by resolutions of both Houses of Parliament,[15] after which it continues to operate for a period of six months.[16]

The effects of a proclamation of emergency issued under Article 352(1) are far-ranging and have been incorporated in various other provisions of the Constitution, for

[8] Article 356(1)(a), Constitution of India.
[9] Article 356(1)(b), Constitution of India.
[10] Article 356(1)(c), Constitution of India.
[11] Article 352(1), Constitution of India.
[12] Id.
[13] Article 356(3), Constitution of India.
[14] Article 356(4), Constitution of India.
[15] Article 352(4), Constitution of India.
[16] Article 356(5), Constitution of India.

instance, Article 83(2), Article 250, Article 353, Article 354, Article 358 and Article 359. It provides no authority to suspend the functioning of the Constitution in a state. Although the State Government continues to function normally and exercise functions assigned to them under the Constitution, the behaviour of Indian federalism undergoes a transformation; the Parliament is empowered to make law with respect to any matter in the State list which is operative until six months after the proclamation ceases to have effect.

Under Article 356, the State Legislature is either dissolved or kept under suspended animation, and thus, ceases to function for the duration of the emergency. Laws for the state are made by the Parliament, which the Governor administers on behalf of the President. The relationship of all States with the Centre changes on the imposition of Article 352, whereas the effects of imposition of an emergency under Article 356 is restricted only to the particular state and the Centre. Furthermore, the imposition of a national emergency has direct implications on the exercise of fundamental rights by citizens, as opposed to the invocation of a state emergency. As may be observed, the affects and implications of both kinds of emergencies are vastly different.

III. JUSTICIABILITY OF THE PROCLAMATION

A. Procedure

National emergencies have been proclaimed in India on three occasions so far; in 1962 in light of the Chinese aggression in the North East Frontier Province, in 1971 due to the war engaged into with Pakistan and in 1975 due to internal aggression. The 38th Amendment Act passed in 1975 to address litigation challenging the validity of the Proclamation issued under Article 352[17] inserted clauses (4) and (5), which were intended to exclude judicial review of the President's satisfaction based on which the Proclamation was issued and subsisted.[18] The pre-1976 position was sought to be reverted to by the 44th Amendment Act passed in 1978.[19] The deletion of clause (5) enabled the court to examine proclamations which were sought to be continued beyond one month without the Parliament's approval by resolution as required under the amended clause (4), or beyond six months from the date of approval so obtained by the Parliament's resolution,[20] or if it is

[17] The Constitution (Thirty-Eighth) Amendment Act, 1975.
[18] *Id.*
[19] The Constitution (Forty-Fourth) Amendment Act, 1978.
[20] Article 352(6), Constitution of India.

sought to be continued even after a resolution is passed by the Parliament disapproving it,[21] or if the President does not call a sitting of the House after receipt of the notice under clause (8).

B. Judicial Evolution

The above constitutes a procedural review that the courts have been granted post the 44th Amendment Act. However, the scope of judicial review of the Presidential Proclamation of a national emergency has been addressed by the judiciary on two levels, *first,* a review of the requirement of satisfaction of the President in arriving at the decision; and *second,* a review of action undertaken by the President in exercise of his emergency powers. The judicial review of proclamation issued under Article 356 however, has remained at the level of reviewing the material relied upon to satisfy the need for issuance of the proclamation.

The courts have taken varying views regarding justiciability, often collapsing the distinction between proclamations issued under Article 356 and those issued under Article 352, treating them as part of the same family of emergency provisions. In the decision of *Mohan Chowdhury v. Chief Commissioner,*[22] the court declined a *habeas corpus* petition filed by a detenu under the 1962 Defence of India Act on the grounds that the individual did not have the locus standi to enforce his right during an Emergency. By virtue of the President's Order passed under provisions of Article 359(1) in furtherance of the emergency declared under Article 352, the individual was held to have lost the locus standi to claim for the enforcement of fundamental rights under Articles 21 and 22. The Supreme Court subsequently ruled against the appellants when the High Court of Punjab and Haryana sought to justify their refusal to entertain detentions made under the Defence of India Act and the constitutionality thereof.[23]

Although the court was in consonance with its earlier decision in *Mohan Chowdhury* in restricting its amenability to writ petitions in the nature of habeas corpus, it addressed the avenues available to detainees wishing to challenge the legality or propriety of legislations, in *Makhan Singh.*[24]

---

[21] Article 352(8), Constitution of India.
[22] AIR 1964 SC 173.
[23] Makhan Singh Tarsikka v. State of Punjab, AIR 1964 SC 381.
[24] Id.

The decision came in light of a challenge against detentions made by the Central Government under the Defence of India Rules enacted in furtherance of powers granted to it by the Defence of India Ordinance. The petitioners could not be precluded by the Presidential Order from proving that their detentions were made outside the provisions of the Act, or in excess of the power conferred to them or if the detention was made *mala fide* due to a fraudulent exercise of power. The court refused to expand the scope to address situations of prolonged emergencies leading to infringement of fundamental rights of individual citizens.[25] It categorised the political nature of the question as delimiting its scope. The onus of safeguarding against the potential abuse of powers was left to the vigilant public opinion and debate, and direct engagement with the political system.

The court in later decisions of *Ananda Nambiar v. Chief Secretary*[26] and *Ram Manohar Lohia v. State of Bihar*[27] solidified the position in *Makhan Singh,* and added two additional grounds of challenge – of the detention order being employed by an unauthorized person, or if the detention was sought to be justified on grounds different from that mentioned in the act under which it was being carried out.

However, the court's opinion voiced by Subba Rao CJ in the decision of *Ghulam Sarvar v. Union of India*[28] addressing an argument of the existence of a possibility of abuse of power leading to totalitarianism, seemed to concur with *Makhan Singh* when it observed that the safeguard against such a situation is the wisdom of the executive and public opinion. It however refused to address the question of whether courts can ascertain the nature of executive action in declaring or continuing emergency being actuated by *mala fides* and an abuse of the power thereof.

With *ADM Jabalpur v. Shivkant Shukla,*[29] the bar to the jurisdiction of courts was held to be total and absolute when a proclamation under Article 352 was followed by an Order under Article 359(1). A review was held not to lie even in cases of *mala fide* or *ultra vires* exercise of power as the entertainment of such a plea would amount to an enforcement of that fundamental right. Khanna J's vociferous dissent in the decision was based on the violation of rule of law as a consequence of ousting judicial supremacy, which he opined not

[25] Venkat Iyer, States of Emergency: The Indian Experience, 118 (Butterworths India, 2000).
[26] AIR 1966 SC 657.
[27] AIR 1966 SC 740.
[28] AIR 1967 SC 1335.
[29] AIR 1976 SC 1207.

to have extinguished due to a statute negating it. His reliance on a "brooding omnipotence" was considered unsustainable in light of positive law which provided for the very opposite. The majority in *ADM Jabalpur* did not address the objection raised regarding the intolerance of absolute power that rule of law envisaged.

The question of justiciability of the proclamation was addressed once again in the case of *Bhutnath v. State of West Bengal*,[30] where it classified the correctness, adequacy or sufficiency of the grounds of satisfaction or the facts on which such satisfaction was based, as a political question, incapable of redress by courts, even in a situation where it posed peril to the exercise and enjoyment of fundamental rights. The appeal against such grounds was opined to be made to the polls rather than to courts.[31] It was post *Bhutnath* that the 38th Amendment Act was passed, declaring the satisfaction of the President to be final and conclusive, unamenable to scrutiny of the courts.

The assessment of the situation of danger mandating recourse to the extraordinary power is left to the subjective satisfaction of the executive, which has the responsibility of protecting the state against threats from external aggression, armed rebellion or war. Courts are, with the objective assessment available to them, necessarily unfit to make such a determination. On addressing the question, Justice Bhagwati in the decision of *Minerva Mills v. Union of India*[32] held that a mere political complexion adduced to the issue at hand would not in entirety exclude judicial review by courts, which would continue to exist as long as a constitutional question is involved, and as reinforcing the basic structure of the Constitution.[33] Herein, the court reserved the power to examine the executive's exercise of powers within the contours of constitutionality, while being simultaneously cognizant of the constitutional values that all the organs of the state are committed to preserve and further.[34]

It however qualified this observation with the acknowledgment that the satisfaction of the President under Article 352 is a subjective one and cannot be based on 'judicially discoverable and manageable standards'. Therefore, where the satisfaction is absurd, perverse, *mala fide,* or based on wholly extraneous or irrelevant considerations, it amounted to no satisfaction at all, inviting judicial intervention notwithstanding Article 352(5). Despite

[30] AIR 1974 SC 1207.
[31] *Id*, at 811.
[32] AIR 1980 SC 1789.
[33] State of Rajasthan v. Union of India, AIR 1977 SC 1361
[34] Minerva Mills, ¶368.

expanding the scope of judicial review, the court also excluded from its purview the challenge of a state of emergency whose grounds have ceased to exist, in light of Article 352(2) which provides for two grounds under which a proclamation of emergency could be brought to an end. However, it continued to reserve the possibility of judicial intervention in cases where there is no justification at all for the continuance of the proclamation of emergency, in all but the most extreme cases.[35]

In the decision of *SR Bommai v. Union of India*[36], the nine-judge bench unanimously ruled in favour of reviewability of the Presidential Proclamation under Article 356, though the judges differed on the question of the scope of review available. The grounds of judicial review largely followed from those discussed in the above mentioned decisions. It was observed that even though the proclamation is issued on subjective grounds, it must be based on an objective determination which is reviewable. Further, the materials relied upon by the President in taking the decision must be such as would induce a reasonable man to come to a conclusion in that respect. The action of the President under Article 356 was classified as a constitutional function which though wrapped in political thicket, per se would not avail immunity from judicial review. This expanded scope of judicial review of the President's proclamation was further expanded in the decision of *Rameshwar Prasad (VI) v. Union of India,*[37] where judicial review of the Governor's satisfaction, regardless of it being based on ministerial advice, was held not to be excluded on the basis of immunity.

The expansion of the extent and scope of judicial review of presidential proclamations may be observed through the above outlined judicial decisions. It is pertinent to note how the discussion on Article 352 existed in parallel alongside the debate surrounding the scope of review under Article 356, without the courts having undertaken a conscious effort to address the question of standards of review *differently* for both.

A pertinent question that arises herein for deliberation is, whether the foregoing observations made with regard to issuance of proclamations under Article 356(1) can be straightaway applied to a proclamation issued under Article 352(1) as they are similarly worded with respect to the President's satisfaction. In issues concerning national emergency under Article 352, there already exists scope for challenge on the post-proclamation stage

[35] States of Emergency, *supra n.* 25, p. 266.
[36] AIR 1994 SC 1918.
[37] AIR 1977 SC 1361.

with respect to the validity of the Presidential Order issued under Article 359, and their implications on fundamental rights.

The challenge against the Presidential Proclamation issued under Article 356, however, exists on the very material based on which the President grounds his satisfaction for the need to issue the proclamation and invoke the procedure under Article 356. However, it may be observed that post the decision in *Bommai,* the scope of review available under Article 352 has been extended to the stage of issuance of the proclamation as well, in addition to the review that already existed over the actions executed after such issuance. Therefore, there now exists a two-stage review process under Article 352 – *first*, the satisfaction on which the President based his assessment of the situation warrantying the issuance of national emergency, and, *second*, of orders and ordinances passed under Article 359, post declaration of national emergency. The extension of a two-stage judicial review to the power to proclaim a national emergency granted to the President by the Constitution, to be exercised in situations gravely threatening the nation, raises pertinent questions about the extent of actual power vested with the President, and of separation of powers.

There are a range of opinions that go both ways, which shall further be examined. According to the learned author M.P. Jain, judicial review has come to be regarded as part of the basic structure of the Constitution, which has been expanded to review of the President's proclamation under Article 356(1). He has opined that in furtherance of the same, it would be safe to extend the reasoning to a proclamation to Article 352(1) as well, with the grounds of review being those enunciated by Bhagwati J. in *Minerva Mills.* D.D. Basu draws a stark distinction between the emergencies under Article 352 and 356, one being a response to the very existence of a state and the other, a response to the failure of constitutional machinery in a state.[38] He further goes on to highlight the practical difficulties of establishing the review of *mala fides.*

Wade and Forsyth[39] acknowledge the political nature of the decision that the executive takes which the courts are manifestly incapable of, while also being cognizant of a situation of misuse of such powers. The considerations that require to be balanced in this situation are, on one side, the independence of the executive, the political wisdom it possesses and must be trusted to exercise, the subjective nature of the decision that requires

[38] DD Basu, Commentary on the Constitution of India, Vol. 9, (8th ed., 2011).
[39] Wade on Administrative Law, (9th ed.), p. 420-421.

consideration of multiple circumstantial concerns, and on the other hand, the possibility of misuse of power, the idea that the Constitution does not envisage an unlimited power on any organ or authority, that of rule of law and the need to assess if the powers are being exercised in the manner envisaged by the Constitution.

IV. COMPARATIVE PERSPECTIVE

A comparative perspective may assist us in making a more informed decision in the approach best suited for the Indian democracy. A caveat may be added at this juncture however, of the differences in the forms of government adopted by the countries under consideration, which have impacted their understanding of separation of powers and exercise of extraordinary powers. The understanding of the exercise of emergency powers in the United States and Canada has evolved over the decades.

They both began with statute-based systems of regulating emergency powers post World War I. Canada delegated broad powers to the executive in times of emergency situations through the War Powers Act, whereas a delegation was undertaken in the United States through a series of smaller statutes. Post 1970s however, the approach adopted by the two countries branched out differently.[40] On recognition of the abuses of emergency powers that the two countries had faced, their responses to the same formulated the approach they adopted in the future. Canada underwent a constitutional revolution of sorts, which produced a different sensibility of the rule of law, the possibilities of exceptions from it and the accountability of exercise of governmental power to constitutional principles. Through this new understanding, it sought to limit the powers exercised by the executive within the contours of the constitution where it rooted its powers, which has been considered a preferred alternative to claiming that executive powers swallow the rest in a time of crisis. This may be evidenced by the various measures it undertook to streamline the exercise of executive powers in times of emergency brought about due to threats of war or terrorism, economic emergencies, health emergencies, natural disasters and other such disruptive situations.[41]

The United States in contrast, underwent no such revolution in constitutional understanding of exercise of emergency powers. The scheme of the allocation of powers

[40] For a detailed historical and legislative discussion on the United States and Canada's use of emergency powers, *see*, Kim Lane Scheppele, *North American emergencies: The use of emergency powers in Canada and the United States*, 4 International Journal of Constitutional Law 213–243 (2006).
[41] Id.

allowed the executive to claim power and exercise it, and receive post-facto ratification for the same. Presidents have continued to assume disproportionate amounts of power, especially post the attacks on 9/11. The policies have been far more draconian, and are not always grounded on statutory enactments.[42] The considerations of national security have overwhelmed the regard for individual rights and freedoms, and may be evidenced by the statistics and grounds used for the detention of thousands of people without fair trial.

Thereby, the legislative trajectory adopted by the United States has provided the executive branch with a higher prerogative in addressing emergency situations, with courts giving a go-ahead to executive assessment.[43] Canada's constitutional revolution came about on acknowledgement of the wide abuse of powers that the executive had engaged into on multiple occasions, which was sought to be protected against. It rooted its understanding of emergency powers with that of the Canadian Charter of Rights and Freedoms.[44] It sought to strike a balance by enabling the exercise of emergency powers in times of crisis, provided its consonance with its constitutional values.

With the United States' excesses on one end and the renewed constitutional understanding that Canada has adopted, the Indian judiciary has carved out a position for itself to ensure a movement from the former to the latter. Since there already existed one level of justiciability of a presidential proclamation of national emergency, a balance needs to be struck by courts regarding the extent of review to be established.[45] The nature of a national emergency continues to remain extremely sensitive and political, and has been conferred by the Constitution to the elected representatives in the Indian democracy. Important comparative constitutional learnings assist us in formulating the need to streamline the manner of exercising emergency powers along with establishing a cogent, precise system of review, which also requires to be flexible to an extent to account for political changes.[46]

V. CONCLUSION

[42] Id.
[43] United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003).; In re Sealed Case, 310 F.3d 717, 734 (Foreign Int. Surv. Ct. Rev. 2002).; Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003), vacated and remanded by 124 S. Ct.
2633; 159 L. Ed. 2d 578. Rumsfeld v. Padilla, 159 L. Ed. 2d 513, 124 S. Ct. 2711 (2004).
[44] *Supra n.* 39, at 241.
[45] Imtiaz Omar, Emergency Powers and the Courts in India and Pakistan (Martinus Nijhoff Publishers) (2002)
[46] Supra n. 24.

The two-stage review process that the Indian judiciary exercises over the proclamation of emergency on the breakdown of the constitutional machinery of a state under Article 356 has been extended to the proclamation of a national emergency under Article 352 through various judicial interpretations discussed above. The extension of the review process not only impedes the executive's decision making powers to a certain extent, but it also fails to recognize the differences in the nature of emergencies proclaimed; where one deals with purely centre-state relations, the other has the potential to impact the fundamental rights of citizens.

Further, the workability of the parity of standards is noted with concern, *first*, in terms of the subjectivity of the political considerations that the executive must necessarily engage with in making such decisions, and *second*, with respect to the ability of courts to engage into such subjective decisions, given the limited information and exposure that they have. The larger concern that the debate revolves is around the preservation of the rule of law. The judiciary's response and its eagerness to involve itself within the loop of the executive's decision making that potentially affects the population at large, stems from its commitment to constitutionality. One need only examine the executive excesses of other jurisdictions and the concurrent use of emergency powers in response to acknowledge the merit in creating limits in the exercise of emergency powers to narrow the scope of potential misuse. The Canadian recourse to its constitution, as opposed to the United States' reliance on statutory law, has enabled it to remain in consonance with its constitutional values, and provides a pertinent lesson for India. Furthermore, in its quest to uphold the rule of law, the evolution of an understanding rooted in constitutionality has the potential to preserve and uphold the basic structure of the constitution and the rights and freedoms of its citizens. However, the courts must strive to create a balance between prudent judicial restraint where informational or operational drawbacks exist on the institution, and in providing for a redressal forum in order to perform its function as a check on the other organs of the state. An understanding premised on the preservation and furtherance of the rule of law and rooted in the constitution may assist in creating the balance.