

FUNDAMENTAL RIGHTS DURING A PROCLAMATION OF EMERGENCY: THE INDIAN EXPERIENCE

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Introduction

In the scheme of the Indian Constitution, the fundamental rights enumerated in Part III, form a fundamental limitation on the powers of the state. This is evidenced by Article 13(2), which provides that any law made, which abridges or abolishes any of the rights in Part III, will to the extent of contravention, be void¹. During an emergency situation, where the security of the nation is at stake, it is however, essential that the state is equipped with adequate powers to deal with the situation in the best possible manner. It therefore becomes necessary to remove the restriction imposed on State power by Part III to a limited extent. At the same time, the restrictions cannot be removed so as to completely obliterate individuals' rights. Part XVIII of the Constitution, which contains the emergency provisions seeks to provide a balance between the two ends; giving the State increased powers to deal with the situation and at the same time ensuring that some of the basic rights in Part III remain intact.

Over the last 50 years, an emergency on account of the security of the nation being threatened has been proclaimed on three occasions. In 1962, during the Chinese invasion, in 1971 during the conflict with Pakistan and once again in 1975 on account of internal disturbance². On all three occasions, the judiciary has had occasion to examine the impact of the proclamation on fundamental rights.

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- 1 An important point to note is that while Article 13(2) renders any law so made void at its very inception, an existing law, i.e., a law that was in force prior to the commencement of the constitution, is not rendered void in a similar manner. For such an existing law, there exists in Article 13(1) a provision referred to as the 'doctrine of eclipse'. Accordingly, when the constitution came into force in 1950, any existing law that contravened any of the rights in Part III did not cease to exist as a whole. The part of the law that contravened Part III would only remain suspended. Subsequently, if by any constitutional amendment, the law no longer contravened Part III, it would become operational. This is not the case for a post-constitutional law. Even if an amendment does away with the contravention, the law would not become operational because it is considered still-born and *void ab initio*. See, *Bhikaji Narain Dhakras v. State of M.P.*, AIR 1955 SC 781; *Madhu Limaye v. S. D. M. Monghyr*, (1970) 3 SCC 746; *Saghir Ahmed v. State of U.P.*, AIR 1954 SC 728; *Deep Chand v. State of U.P.*, AIR 1959 SC 648; *Mahendra Lal Jaini v. State of U.P.*, AIR 1963 SC 1019.
- 2 J.N. Pandey, *Constitutional Law of India*, 461 (1989). In 1962, the emergency was proclaimed on account of war and external aggression, in 1971 on similar grounds and in 1975 on the ground of 'internal disturbance'. It is important to note that by the 44th Amendment in 1978, the ground of 'internal disturbance' was replaced by that of 'armed rebellion'.

The Constitutional Provisions - Articles 358 and 359

The phrase 'proclamation of emergency' is defined in Article 366 of the Constitution, as a proclamation made under Article 352(1). Article 352, in turn deals with a national emergency whereby the security of India is threatened. The three conditions where such a threat may arise, as specified in clause (1) are- war, external aggression or armed rebellion.

The specific provisions of Part XVIII which deal with the position of fundamental rights during a proclamation under Article 352 are Article 358 and Article 359. Article 358 provides for the *suspension of the provisions in Article 19*, during a proclamation while Article 359 provides for the *suspension of the enforcement of certain rights* during a proclamation. This is the principal point of difference³ between the two; that while one provides for the suspension of the entire right, the other provides that by an order the president can only suspend the enforcement of certain rights, i.e., the remedy. It is often misunderstood that both provide for the suspension of the entire right.

Further, while it may seem that the suspension of the enforceability of a fundamental right has the same effect as the suspension of the right *per se*, this is not true. In the event of the right to move the court for the enforcement being suspended, the rights remain *theoretically alive*⁴. As a result, only the right of the individual to approach the court is taken away. Hence, the court still has the power to enforce a right, if it so wishes, *suo moto*⁵.

The Emergency of 1962:

The first time a national emergency was proclaimed in India was in 1962, when the Chinese attacked the North-East Frontier Area (NEFA). The emergency was proclaimed on the ground that the security of India was threatened by war and external aggression. As a result of this proclamation, Article 358 automatically

3 Other differences also exist between the two. While Article 358 comes into effect immediately upon the proclamation under Article 352, for Article 359 to come into force a Presidential order is necessary. The Presidential order is to be placed before the Parliament and must obtain parliamentary approval for it to come into force. Further, the suspension under Article 358 continued for the entire duration of the emergency, while the order under Article 359 will continue for the duration specified in the order.

4 *Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381, 387.

5 For instance, in pursuance off the power granted to the Supreme Court under Article 142 of the Constitution, to pass an order as is necessary to do 'complete justice' in any matter or cause before it. Thus, only the *locus standi* of the individual to enforce the rights is taken away and not the courts' jurisdiction. *See, Mohan Chowdhury v. Chief Commissioner, Tripura*, AIR 1964 SC 173.

came into force thereby suspending the provisions of Article 19, empowering the state to make any law in contravention of the rights contained therein. In pursuance of this proclamation, the President passed an order under Article 359, whereby the rights of an individual to enforce the rights contained in Articles 14, 21 and 22 were suspended if the rights were deprived by virtue of any action taken under the *Defence of India Ordinance*⁶, 1962⁷.

An important point to take note of with regard to this order is that it was conditional in two ways. One, that it suspended the right of individuals to enforce only their rights contained in *Articles 14, 21 and 22*⁸. Two, that it prohibited enforcement only when the rights were deprived under the Defence of India Act⁹.

One of the first cases to come before the Supreme Court where the scope and effect of this order was examined was that of *Makhan Singh Tarsikka v. State of Punjab*¹⁰. The court in this case, pointed out the difference between the suspension of the right under Article 358 and the suspension of the enforcement under Article 359. An important proposition to emerge from this case was that in seeking to enforce the rights of the detenu, the courts had to look at the *substance* of the order and not its *form*. As a result, it could not resort to other provisions under different statutes, which would have the effect of enforcing a right, which was to be curtailed by the order¹¹.

The most important proposition of law laid down by the court in this case was that while the order forbade a challenge to an order of detention under the Articles specifically mentioned, it did not prevent a challenge on other grounds.

6 Which later became the Defence of India Act, 1962.

7 For the exact words of the order See, Durga Das Basu, *Commentary on the Constitution of India*, 436 (1970).

8 This is with specific reference to the order under Article 359. Apart from this, the rights in Article 19 were automatically suspended.

9 Thus the order was bi-conditional, a factor referred to in later decisions. This order is to be contrasted with that of 1971, which was uni-conditional.

10 *Supra.*, n. 4. This case involved a series of 26 petitions for the writ of *habeas corpus*. The detenus were detained in accordance with the provisions of Rule 30 of the *Defence of India Act*. The court in this case examined in detail the true scope of a Presidential order under Article 359.

11 This was in the context of the petitioners raising the argument that the Presidential order did not restrict the power of the court to grant a writ of *habeas corpus* under Sec. 491(1)(b) of the Code of Criminal Procedure. The Supreme Court rejected this argument and concluded that the courts did not have the power to do indirectly what they could not do directly. Thus, any remedy under Article 32, Article 226 and Sec. 491(1)(b) of the Code of Criminal Procedure, would have the same effect and was therefore impermissible.

Thus, the detenu could still challenge the order on the basis of other rights and on grounds such as *mala fide*, excessive delegation, improper application of the law and the like¹². The detenu was not altogether without any remedy. While the petitioners were unsuccessful in proving any of these *alternate* grounds to set aside the order of detention, nevertheless in several subsequent decisions the Supreme Court has applied this proposition¹³.

The next important question that arose before the Supreme Court, was whether the order issued under Article 359 could be challenged on the basis of the very rights it sought to prohibit the enforcement of. In the case of *Ghulam Sarwar v. Union of India*¹⁴, the petitioner challenged the validity of the Presidential order issued under Article 359, on the ground of it violating Article 14, the very right it sought to prevent the enforcement of. Surprisingly, the court allowed such a challenge. The court drew a distinction between the order *per se* and the *effect* of the order. Thus, if the order was in itself violative of Part III, then it would be *void*¹⁵ and would not result in the suspension of the remedies in the Articles mentioned. While this proposition was put forth, the court examined the order and came to the conclusion that it was in fact a reasonable classification and not violative of Article 14.

12 An important observation made by the court however, was that in the event of a challenge to the Defence of India Act being allowed and the Act being held invalid, then it would still amount to an enforcement of the detenu's right to life under Article 21, which was prohibited. *See, supra.*, n. 4 at p.386.

13 *See, Durga Das Shirali v. Union of India*, AIR 1966 SC 1078, where a challenge was permitted on the ground of *mala fide*; *Ananda Nambiar v. Chief Secretary, Government of Madras*, AIR 1966 SC 657, where a challenge was permitted on the grounds of *mala fide* and excessive delegation; *Jaichand Lal v. State of West Bengal*, AIR 1967 SC 483, where a challenge was permitted on the additional ground of the detaining authority not applying its mind; *State of Maharashtra v. Prabhakar Pandurang Sanzgiri*, AIR 1966 SC 424, where the detention order was set aside on the ground of *mala fide*; *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740, where the order was set aside on the ground of it not being in strict compliance with the Defence of India Act; *Jagannath Misra v. State of Orissa*, AIR 1966 SC 1140, where the order was set aside for being in contravention of Sec. 40 of the Defence of India Act; *Sadanandan v. State of Kerala*, AIR 1966 SC 1925, where the order was set aside on the ground of *mala fide*.

A similar application of this principle was also done by the High Courts. *See, Benoy Kumar v. State of West Bengal*, AIR 1966 Cal 509, where the order was set aside on the ground of *mala fide*; *Bhola Rai v. Superintendent, District Jail, Ghazipur*, AIR 1967 All 77, where the order was set aside upon the petitioner proving that the detention was based on an illusory ground.

14 AIR 1967 SC 1335. In this case, the petitioner was a foreign national who was caught travelling without any documents. He was therefore put in detention. The first Presidential order issued on 31-10-1962, provided for the detention of foreign nationals alone. This was challenged as being violative of the equality clause contained in Article 14.

15 By virtue of Article 13(2), which provides that any law made in contravention of the rights contained in Part III would be rendered void to the extent of the contravention. The term 'law' is defined in Article 13(3)(a) to include an order having the force of law.

While this proposition may have been technically sound, if it is looked at realistically, it defeats the entire purpose of the order under Article 359. It was therefore overruled by a larger bench of the Supreme Court in *Mohd. Yakub v. State of J&K*¹⁶. Here, the court rightly pointed out that the Presidential order under Article 359 and Article 13(2) had to be constructed harmoniously, so as to prevent either being rendered nugatory. Thus, the court interpreted the word 'law' in Article 13(3)(a) to exclude a presidential order under Article 359. This approach taken by the court seems to be more practical and would not defeat the very purpose of the Presidential order, which is to remove a fetter on the State's power to a limited extent.

Several decisions of the Supreme Court and the various High Courts followed these main propositions¹⁷. Another important point laid down by the courts, was that Article 358 and an order under Article 359 could not validate a pre-emergency law which was invalid *ab initio*. In *State of Madhya Pradesh v. Bharat Singh*¹⁸, the court held that the automatic suspension of the rights under Article 19 during an emergency could not be used to validate a pre-emergency law. This was in keeping with the recognition that for a post-constitutional law, the doctrine of eclipse did not operate and therefore, such a law if it contravened any of the provisions in Part III, would to the extent of such a contravention be rendered void *ab initio*¹⁹.

During the emergency of 1962 and the Presidential order under Article 359 that followed, the impact on the fundamental rights in Part III was therefore kept at a reasonable level. The interpretations given by the courts sought to strike a balance between an individual's basic freedoms and the state's increased power to deal with the situation. This was achieved by allowing challenges to detention

16 AIR 1968 SC 765. This was a series of 21 petitions seeking a writ of *habeas corpus*. The detenus had been detained in accordance with Rule 30 of the Defence of India Act. The petitioners at the very outset sought to challenge the Presidential order as not having any nexus with the security of India and therefore being unnecessary. The court rejected this argument and concluded that the very fact that it was issued assumed that it was in furtherance of the security of India.

17 See, *Jagdev Singh v. State of Jammu & Kashmir*, AIR 1968 SC 327, where a challenge was permitted on the ground of *mala fide*; *District Collector, Hyderabad v. Ibrahim & Co.*, (1970) 1 SCC 386, where a challenge on the ground of violation of Article 19(1)(g) was barred, but a challenge on the ground of statutory non-compliance was permitted; *State of Maharashtra v. Lok Shikshan Sanstha*, (1971) 2 SCC 410, where a challenge was permitted on other grounds.

18 AIR 1967 SC 1170.

19 This decision was relied upon in *Bennett Coleman v. Union of India*, AIR 1973 SC 106, where the court held that Article 358 could not validate a law which was a continuation of a pre-emergency law which was invalid. See also, *Partap Singh v. State of Punjab*, AIR 1975 P&H 324; *Meenakshi Mills v. Union of India*, AIR 1974 SC 366, where the same proposition was restated.

orders on grounds other than those *expressly* prohibited. At the same time however, if any indirect means were employed to circumvent the express provisions, such means were also prohibited. The courts thus, gave the express provisions a wide interpretation, and at the same time the width of such an interpretation was curbed by preventing the reading of *implicit* grounds into them.

The Proclamation of 1962 continued till 1968. The Presidential order under Article 359, also continued for the same duration.

The Emergencies of 1971 and 1975

In 1971, during the conflict with Pakistan, the President once again by a proclamation under Article 352 brought into force an emergency on the ground that the security of India was threatened by war. Before this emergency came to an end, in 1975 again, an emergency was proclaimed on the ground that the security was threatened owing to an 'internal disturbance'²⁰. Both these emergencies came to an end in 1977²¹.

In furtherance of these proclamations, the President in 1975 made an order under Article 359 declaring that the right of any person to move any court for the enforcement of the rights contained in Articles 14, 21 and 22 and all proceedings pending in courts for the enforcement of the same stood suspended for the period during which the proclamations of 1971 and 1975 were in force²².

While the order was similar to that of 1962, it differed in one important aspect. While the earlier, one barred challenges only when a deprivation was made under the *Defence of India Act*, the order of 1975 made no such categorisation. Further, the order also provided for the suspension of all proceedings that were pending before the courts for the enforcement of the mentioned rights.

With regard to the suspension of proceedings pending before the courts, the question that immediately arose was with regard to the nature of the suspension. In the event of an interlocutory injunction having already been granted, was it to be lifted or was the entire proceeding to be frozen? Several High Courts took

20 As is stood then, 'internal disturbance' was a ground whereby the security of India could be threatened so as to necessitate a proclamation of emergency under Article 352(1). By the 44th Amendment Act, 1978 this ground has been replaced by that of 'armed rebellion'.

21 See, T. K. Tope, *Constitutional Law of India*, 600 (1982).

22 For the exact order See, H. M. Seervai, *Constitutional Law of India: Vol. III*, 1677 (1979).

differing views on the issue²³. While the exact position is still somewhat unclear, the most appropriate position seems to be restoration of complete *status quo ante*. This would even mean vacating an interim stay order if such an order had been passed. Another similar point of controversy that arose was with regard to whether suspension of Article 14, meant suspension of other Articles considered species of Article 14, such as Articles 15 and 16. On this point too, the High Courts expressed opposing opinions²⁴.

The most important case that came before the Supreme Court with regard to the Presidential order of 1975 was that of *A.D.M., Jabalpur v. Shivakant Shukla*²⁵. This case has been regarded as one of the biggest blunders committed by the Supreme Court since 1950. The court in this case came to the conclusion that in view of the Presidential order under Article 359, no person had the *locus standi* at all to approach either the High Court or the Supreme Court for any writ. The court also concluded that a challenge to the detention order on other grounds not mentioned in the Presidential order such as *mala fide*, extraneous considerations, etc. was also forbidden²⁶.

23 See, *Raj Kumar v. Union of India*, AIR 1976 HP 34, where the court held that though proceedings were to be suspended it did not preclude the court from granting an interim injunction which could be granted on the *prima facie* case and not on the merits. In *K. P. Singh v. State of Bihar*, AIR 1976 Pat 248, the court drew a distinction between the suspension of a proceeding and the staying of a proceeding. The court held that suspension of a proceeding meant the vacation of a stay order too, unless the stay order was the final relief being sought. In *Jagadish v. Union of India*, AIR 1976 Cal 17, the court said that during a suspension of proceedings, the proceedings were frozen. As a result, any interim injunction granted would remain. The court while recognising that this could result in an undue advantage to one party, opined that the emergency situation necessitated this.

24 In *Arjun Singh v. State of Rajasthan*, AIR 1975 Raj 217, the court opined that suspension of Article 14 did not include the suspension of Article 16. The court interpreted the Presidential order so as to ensure the preservation of as many fundamental rights as possible. The court differed in its opinion from an earlier decision in *Shyam Behari v. Union of India*, AIR 1963 Ass 94, where the court had held that Article 16 being a species of the right to equality in Article 14, was also suspended under the Presidential order of 1962.

25 AIR 1976 SC 1207: (1976) 2 SCC 521. Hereinafter referred to as the *Habeas Corpus Case*. During the pendency of the proclamation under Article 352(1), certain drastic changes were made to the Maintenance of Internal Security Act (hereinafter, the "MISA"). It provided for more stringent forms of preventive detention. See, M.P. Jain, *Indian Constitutional Law*, 730 (1994). This case related to a series of petitions filed seeking a writ of *habeas corpus*. The detenus were detained under the MISA. The appeals came from High Courts from all around the country and were heard by a bench consisting of A. N. Ray, C.J., H. R. Khanna, M. H. Beg, Y. V. Chandrachud and P. N. Bhagwati, JJ. The judgement was delivered by a majority of four, with Justice Khanna being the sole dissenting voice.

26 *Ibid.* at p.1392. "In view of the Presidential Order...no person has *locus standi* to move any writ petition under Art. 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 in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous considerations."

The decision therefore prohibited *any* challenge to a detention order during the emergency period, something that was expressly avoided in previous decisions²⁷. This decision would have far-reaching repercussions. It placed unnecessary, unfettered power in the hands of the detaining authorities. In simple terms, it granted the state authority to commit blatant violations of basic human rights and get away without being accountable to anyone.

In *Makhan Singh Tarsikka's* case²⁸, the court had reiterated that a challenge to a detention order on grounds not mentioned in the Presidential order was permissible. In the *Habeas Corpus Case* however, the court sought to distinguish the previous decision. This was done on two grounds; one, that the reference to this aspect in *Makhan Singh Tarsikka's* case was mere *obiter dictum*²⁹ and two, that the order of 1962 was conditional unlike the order of 1975³⁰. Both these distinctions appear to be flawed.

In the first place, with regard to the reference in *Makhan Singh Tarsikka's* case about challenges being permissible on other grounds, the court did in fact go into the merits of one such challenge on the ground of the Defence of India Act, being a colourable legislation³¹. This is more than indicative of the fact that such a reference was not a passing reference. Further, even if it is conceded that the mention of other grounds was *obiter dicta*, why is such an *obiter*, not binding on a subsequent co-equal bench³²? Secondly, as mentioned earlier, both the orders were conditional to the extent that they restricted an enforcement on the grounds only of violation of the rights contained in Articles 14, 21 and 22. It is wholly inconsequential that while the former provided for the deprivation under the Defence of India Act, the latter did not specify any legislation. Therefore, the argument that the orders were substantially different is not a sound one.

The effect of the order was that if the State authority detained an individual on its whim, the detention order could not be challenged during the pendency of

27 On this point, there appears to be an inherent contradiction in the judgement. In the main body of the judgement, three of the five judges accepted the position that the detaining authority needed to possess the authority to make the detention before the courts could dispose of the petition. In the final order however, the bench concluded that a challenge based on the detaining authority acting beyond its authority was not permitted, because no person had the *locus standi* to do so. See, H. M. Seervai, *supra.*, n. 22 at p.1644.

28 *Supra.*, n. 4.

29 (1976) 2 SCC 521, 562.

30 *Ibid.* at p.542.

31 *Supra.*, n. 4 at p.386.

32 Article 141 of the Constitution merely uses the phrase "...law declared by the Supreme Court". An *obiter* observation is a discussion of a point of law in the absence of its direct application to the facts and circumstances of the case at hand. Such an observation would therefore also amount to a declaration of law under Article 141 and would have the same binding effect as a *ratio decidendi*. See, A. M. Bhattacharjee, *Matrimonial Laws and the Constitution*, 8 (1996).

the emergency. Even if the authority detained an individual without the authority of a substantive law, the detention was to be deemed valid. While some of the judges in this case, specifically stated that the detention had to be under a valid law, the final order passed forbade a challenge even if the detention was without a valid law.

Another startling conclusion reached by the court was that Article 21 of the Constitution was the sole repository of the rights to life and personal liberty and when the enforcement of Article 21 was suspended, the right to life could not be enforced under any other law³³. This immediately raises the question whether it would have been better to have done away with Article 21 from the Constitution. If it had not been mentioned in Part III, then it could not have been taken away either, it would have continued to exist as a natural right and as a common law right. By mentioning it explicitly, the result was to abrogate its existence in these other forms³⁴. This seems to be an inherent paradox in the reasoning of the Supreme Court.

- The Supreme Court in this case seems to have taken an idealist position³⁵, placing too much reliance on the *bona fide* intentions of the executive. Sadly, the series of custodial deaths and human rights violations that came to light following the emergency proved the Court wrong³⁶.

33 *Supra.*, n. 29 at p.530.

34 "...The only right to life and liberty is enshrined in Article 21...If any right existed before the commencement of the Constitution and the same right with its content is conferred by Part III as a fundamental right, the source of that right is in Part III and not in any pre-existing law". *See, ibid.* (per Ray, C.J.) How correct is such an interpretation? While it can be said that Part III of the Constitution no doubt makes certain rights fundamental and absolute, in doing so does it abrogate the existence of those rights under other statutes or laws? This cannot be true. For instance, while Article 19(1)(g) gives citizens the right to carry out any lawful profession, this right cannot be realised but for other laws such as those relating to the Sale of Goods and Contracts. The right to enter into a contract is no doubt one covered by Article 19(1)(g), but this cannot abrogate the right under the Indian Contract Act, without which the right would be useless. The only purpose therefore that Part III serves is to make the right fundamental and basic. Part III therefore cannot contain every single right an individual is entitled to. Further strength is lent to this argument by the change introduced by way of the 44th Amendment, which included the right to property under Article 300A.

35 "...we understand that the care and concern bestowed by the State authorities upon the welfare of the detenus who are well-housed, well-fed and well-treated, is almost *maternal*." (per Beg, J.) This is reflective of the Supreme Court's ignorance of the ground realities. The question that arises is whether the Supreme Court was truly ignorant or whether the decision was one of political necessity. *See, H. M. Seervai, supra.*, n. 22 at p.1635.

36 For a detailed critique of the entire judgement *See, H. M. Seervai, supra.*, n. 22 at pp.1635-1683. Several other important observations were made by the court. One important one was that during an emergency the only rule of law that operated was that envisioned in Part XVIII. Another important observation was that there was no natural law or common law right to the writ of *habeas corpus*.

While the judgement of the majority in the *Habeas Corpus* case was clearly nothing short of outrageous, special mention must be made of the dissenting judgement delivered by Justice Khanna. His judgement stood as the lone voice seeking to uphold the cherished ideals of a rule of law and non-arbitrariness fundamental to any democratic setup. To date his judgement stands as one of the few reminders of India's commitment to democratic ideals during the darkest years of the emergency³⁷.

The decision in the *Habeas Corpus* case was relied upon and followed in the subsequent decision of *Bhanudas Krishna Gawde v. Union of India*³⁸. Here the court reiterated the same propositions and concluded that it would not enforce the right to life indirectly through any natural or common law right.

Thus, under the emergencies of 1971 and 1975 and the order under Article 359 issued during the later one, the fundamental rights under Part III were literally obliterated. Unbridled and unrestricted power was placed in the hands of the executive. The scales were literally rendered vertical in favour of the state's authority vis-à-vis individual liberties. This position lasted till 1977, when the proclamation was revoked. Subsequently, by certain constitutional amendments, the propositions put forth were rendered nugatory. While the *Habeas Corpus* case may have no more than historical value today, it nevertheless serves as a reminder of the blatant abuse of power that took place during the emergency of 1975 and the inability of the Supreme Court to deal with it effectively.

Subsequent Developments

With the revocation of the emergency and the election of a new government at the centre in 1977, several amendments were made to Part XVIII of the Constitution. The primary focus was to prevent a blatant abuse of power as had been carried out in the preceding years.

These changes were made mainly by the 42nd and 44th Amendment Acts of 1976 and 1978 respectively. One of the fundamental changes made to Article 352, mentioned earlier was the substitution of the phrase 'internal disturbance' with

37 "Rule of law is the antithesis of arbitrariness...the accepted norm of civilised societies. One of the essential attributes of the rule of law is that executive action to the prejudice of or detrimental to the right of an individual must have the sanction of some law." *See, supra.*, n. 29 at pp.539-540. Justice Khanna concluded his judgement with the moving words, "A dissent in a court of last resort...is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." *See, H. M. Seervai, supra.*, n. 22 at p.1636.

38 (1977) 1 SCC 834. This case related to detentions under the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 (COFEPOSA).

that of 'armed rebellion'. This was primarily because the emergency of 1975 had been proclaimed on the ground of 'internal disturbance'.

With regard to Articles 358 and 359, the most important change that was made was in clause (1) of Article 359³⁹. With the change, the President was now permitted to restrict the enforcement of any of the rights in Part III except those contained in Articles 20 and 21. Thus, the fundamental right to life and personal liberty has been made absolute. Going by the proposition that Article 21 is the sole repository of the fundamental right to life, then this would mean that this right cannot be abrogated during an emergency too, except by a 'procedure established by law' as mentioned in Article 21.

Further, following the dictum laid down in *Maneka Gandhi*⁴⁰, that any law to stand the test of Articles 14, 19 and 21 had to be just, fair, right and reasonable, the possibility of a repeat of the emergency actions seems remote. Thus any procedure providing for detention during the emergency will now have to stand the tests of non-arbitrariness, reasonableness and must contain the basic principles of natural justice for it to be valid.

For any law made in accordance with Articles 358 and 359 contravening the rights specifically mentioned therein to be granted immunity from being challenged as violative of Part III, the law must contain an *explicit* recital that it is in relation to the Proclamation under Article 352.

Several other minor modifications were made to Articles 352, 358 and 359⁴¹. As a result of all these changes, the position as it stands today seems to be that the decision in the *Habeas Corpus* case is no longer good law. While there still exists ample scope for executive abuse of these provisions, they nevertheless have sought to plug several of the more apparent loopholes that existed earlier.

Conclusion: The Supremacy of Basic Liberties?

The Indian experience with regard to the impact of a proclamation of emergency on fundamental rights reveals impetuous variations at different points of time. During the emergency of 1962 and the Presidential order passed under

39 By the 44th Amendment Act, 1978.

40 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597.

41 Such as the inclusion of a clause, providing for the coming into force of Article 358 only when an emergency is proclaimed under Article 352 on the grounds of war or external aggression; the introduction of a proviso to clause (2) of Article 359 providing for the extended geographical application of an order issued thereunder only when the President is satisfied about the necessity of such an application; the introduction of a provision in Article 352 for the proclamation of a national emergency even before the security of India is actually threatened, but when the occurrence of such a threat is imminent.

Article 359 during its pendency, the courts sought to strike a fine balance between the necessity of equipping the state with increased powers and individual liberties. In 1971 and 1975 this approach was completely done away with. Fundamental rights and basic liberties were almost totally abrogated. This period looked to destroy the basic ideals that Indians had struggled for under colonial repression. After the revocation of the emergency, several changes have been made to ensure the supremacy of certain basic liberties.

The Indian experience relating to fundamental rights during the proclamation of an emergency over the last 50 years represents the process of the Indian politico-legal machinery maturing. This process of maturation has witnessed the transformation of a system from one with close to no regard for basic human liberties to one where certain liberties are held inalienable and supreme. This process is but a representation of an increasing political consciousness both among the legislature and the judiciary. The process, it may be added is far from complete. It however is undoubtedly a step towards the progressive evolution of the Indian Constitutional machinery.

Nevertheless, any legal and political machinery is capable of being abused. The changes instituted by the 42nd and 44th Amendment Acts are capable of being abused too. It therefore, must be reiterated that a judicious use of the emergency provisions can never be assured completely. It depends to a large extent on the government's commitment to democratic ideals and more importantly on the judiciary's readiness to ensure this commitment.

Hopefully, having learnt several lessons from the emergency of 1975 and the atrocities committed on the pretext of preserving the 'security of the nation', a greater commitment will be seen from all the organs of the State towards ensuring the basic ideals of democracy. Nevertheless, only time can tell conclusively.