

“Article 352: Position of Fundamental Rights during National Emergency – A Doctrinal Research”

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Abstract

Emergency is an extreme situation where the democratic government comes to that level where they fails to control the situation or there is severe threat on the nation or any part of the territory. Emergency can be of many types it can be national, financial or state emergency . it is a situation where president of India takes the ultimate calls and proclaims an emergency. This paper talks about the position of fundamental rights during emergency. At the time of emergency all the fundamental rights are suspended by law and only right to life and personal liberty are there. Here I will talk about what is the need to declare emergency? and what is a need to suspend all the fundamental rights during national emergency? What are the pros and cons of suspending fundamental rights during emergency? These topics are covered under the paper taking reference of relevant case statutory provision, case laws, journals and research articles. The paper concludes with the certain sets of suggestion and recommendation that can be followed to combat problem in future.

Keywords : emergency,pros, cons,types of emergency, article, Indian constitution

INTRODUCTION

“EMERGENCY”; it is a situation where president of India feels that the¹ situation is very serious and the security of India or any part therefore threatened or is likely to be threatened. Emergency can be declared by the president only.

Originally the constitution of India has provided for imposition of emergency caused by war , external aggression or internal disturbance which is also called “armed rebellion”. To declare an emergency the president has to take recommendation in written from his cabinet members. After the recommendation of national emergency from the cabinet members it has to be approved by both the houses of parliament by absolute majority of the total member of the house as well as 2/3 majority of members present and voting within one month, otherwise the proclamation ceases to operation.

¹ www.drishtiiias.com

The constitution of India provides for three different kinds of emergency

1. ²An emergency due to war , external aggression or armed rebellion (article 352)
It is called “NATIONAL EMERGENCY”
2. Failure of constitutional machinery in states (article 356)
3. FINANCIAL EMERGENCY (article 360)

Here in this paper I will talk about the national emergency and what is the position of fundamental rights during the period of national emergency .

WHAT IS THE SITUATION OF FUNDAMENTAL RIGHTS DURING NATIONAL EMERGENCY

All the fundamental rights are suspended during the time of national emergency , only the right to livelihood and right against prisoners are there . is it correct to suspend all the fundamental rights given to citizen of India by the constitution during the time of national emergency? . Can the suspension of fundamental rights can exploit the general public? If the fundamental rights will not be there with people a person having authority can easily exploit them.

FUNDAMENTAL RIGHTS

Fundamental rights are those rights which are necessary for the survival of human being with dignity .⁴ these rights are given to every citizen of India and if there is violation of any of these rights a person can approach the court. These rights have helped people to live their life with full dignity , the abolition of untouchability was possible because of these rights only , these rights can be classified under six heads

THERE ARE 6 FUNDAMENTAL RIGHTS RECOGNISED BY THE INDIAN CONSTITUTION :

RIGHT TO EQUALITY (article 14-18)

RIGHT TO FREEDOM (article 19-22)

RIGHT AGAINST EXPLOITATION (article 23-24)

RIGHT TO FREEDOM OF RELIGION (article 25-28)

²<http://jurip.org/wp-content/uploads/2017/08/Asmit-Chitransh.pdf>

⁴ <https://edugeneral.org/blog/polity/fundamental-rights-articles-14-18-19-22-23-24-25-28-29-30-32/>

CULTURAL AND EDUCATIONAL RIGHT (article 29-30)

RIGHT TO CONSTITUTIONAL REMEDY (article 32)

HISTORY OF NATIONAL EMERGENCY PROVISION –

National emergency is caused by war, external aggression or armed rebellion in the whole of India or a part of its territory . the president can declare such an emergency only on the basis of written request by the council of ministers .⁵ such as proclamation must be approved by the parliament within one month . such an emergency can be imposed for six months . it can be extended for six months by repeated parliamentary approval.

In such an emergency , fundamental rights of the Indian citizen can be suspended .

HOW MANY TIMES NATIONAL EMERGENCY HAS BEEN DECLARED:

Three times national emergency has been declared:

1. The first emergency was declared on 26th October 1962 after China attacked our borders in north east. the national emergency lasted till 10th January 1968.
2. The second national emergency was declared on December 3 1971 in the wake of second India Pakistan war and was lifted on march 21 1977
3. The third national emergency is called internal emergency and was imposed on 25th june 1975. This emergency was declared on the grounds of internal disturbance.

EFFECTS OF NATIONAL EMERGENCY

1. During national emergency the executive power of the center extends to directing any state regarding the manner in which its executive power is to be exercised.
2. The parliament becomes empower to make laws on any subject mention on their list.
3. During the period the Lok Sabha can extend its tenure by a period of one year at a time. But the same can not be extended beyond six months after the proclamation ceases to operate. the tenure of state assemblies can also be extended in the same manner .
4. The president is empowered to modify the provision regarding distribution of revenue between the union and the states.
5. The fundamental rights automatically suspended and this suspension continues till the end of the emergency. But according to the 44th amendment article 19 can be suspended only in case of proclamation on the grounds of war or on external aggression and not on grounds of arm rebellion. Other fundamental rights may also get suspended except article 20 and 21 .

⁵ <https://www.scribd.com/doc/90094024/Research-Paper-on-National-Emergency-and-Fundamental-Rights>

WHAT IS THE NEED TO DECLARE EMERGENCY ?

When is any external aggression or arm rebellion on India or any part of the country ,⁶ to resolve and control it there is need to declare emergency and put the power in the hands of president . As India is a democratic nation , when crises situation occurs cannot deal with them in its normal process since it needs immediate action, therefore president declares emergency so that he can have the authority to proclaim emergency after he is satisfied after discussion and advice with the council of minister that it is the need of the hour. But that is the time when the president is the only controlling authority , and being a democratic state , it creates the assumptions of extraordinary power in hands of the president will be in derogation of the civil and political rights normally ensured to the citizen by the democratic situations.

WHAT IS THE NEED TO SUSPEND ALL THE FUNDAMENTAL RIGHTS DURING EMERGENCY ?

It is important to suspend the fundamental rights during national emergency because⁷ it's a time to control all the things In different manner , at that time the power is in the hands of president and controls the situation the way he likes to, at that time if fundamental rights will be with the people it will became hard to take decisions for the president because every time he thinks to take action may be some fundamental rights will come to his way to stop him by taking decisions.

PROS AND CONS OF SUSPENDING FUNDAMENTAL RIGHTS DURING NATIONAL EMERGENCY

It will be helpful to president to suspend the fundamental rights during national emergency because if he do so he can easily take decisions whatever he thinks essential to control the situation. There will be no delay in decision making and the needed action can be taken on time.

It can be worse for the general public if the fundamental right of right against exploitation be suspended during the time of national emergency because if the people will not have right against exploitation a person with authority can exploit them, they can make them do anything they want and the public will be helpless because they can will not be able to approach the court for the exploitation. The person with higher authority can misuse his authority and can exploit the general public.

⁶<http://jurip.org/wp-content/uploads/2017/08/Asmit-Chitransh.pdf>

SUGGESTIONS

In my point of view if right against exploitation will be suspended during the period of national emergency there may be problems for general public because the person with authority can easily exploit them and they will not have any remedy for it. They will have to listen the orders and follow the orders of authority which may lead to their exploitation.