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A LEGAL AND HISTORICAL STUDY ON EMERGENCY PROVISION IN INDIA (1935 TO PRESENT)

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I. ABSTRACT

The country which forgets the history that needs no evil to destroy itself, because forgetting one's own history is sufficient to destroy it, said Swamy Vivekananda. A country should focus on the historical evolutionary part, while making a decision, which would provide appropriate guidance to resolve the current challenges. In the Indian constitution Articles 352 to Article 360 deal with the emergency provisions to tackle the extraordinary situations. Emergency provisions have an evolutionary history from the Government of India Act of 1935 to the present day. This evolution contains very interesting amendments, the 42nd and 44th Constitution amendments. This work focuses on the legal and historical evolutionary part of Indian emergency provisions.

II. KEYWORDS

Emergency, Government of India Act, Constitutional Amendments on Emergency.

III. INTRODUCTION

"Freedom is my birthright" proclaimed Bal Gangathar Tilak. When the freedom fights were in the heat moment, certain functional changes also happened in India (British Raj). The Government of India Act of 1935 is one among them, made from the freedom fight, vehement aggression. Britishers tried to make an amicable situation through these kinds of several legislation and gave some power to India through those legislatures. Whenever the law of the land is in a discussion point, the people's rights play a significant role in that debate. But unfortunately, the Government of India Act, 1935 did not contain any of the provisions related to rights. This clearly shows that the Britisher's main motive for India, is merely a colonial state, and they did not have the

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will to make me a civilized society. Meanwhile, the Government of India Act of 1935 includes the emergency provisions to proclaim an emergency throughout the nation or any of the provinces in India (British Raj). Even today our constitution of India contains the provisions for emergency proclamation. This article aims to analyze the historical and legal evolution of the emergency provisions in India from 1935 to the present times by undertaking a doctrinal study of the related constitutional provisions and amendments.

IV. HISTORY LEGAL EVOLUTION OF EMERGENCY

- *Government Of India Act, 1935*

This is the foremost legislature which contains the overview of the governmental set-up of India. Sections 45 and 102 deal with the national emergency and section 93 (Government of India) deals with the provincial emergency. Section 45 of the Government of India Act says Governor General have the power to proclaim an emergency. Ground for proclamation is that should be the mere existence of the non-function ability, which was said in the Government of India Act, 1935 to the satisfaction of the Governor-General.³ It should be proclaimed throughout India (British Raj) because this is the thread for the federal government. No such rights are given under these acts, so people's rights will not expressly infringe through this proclamation, it will continue as in earlier situations. Governor General is the authority to make a lot of decisions in that period, he can,

1. Make extension according to his discretion as mentioned in the proclamation.
2. Take over any functions vested in any federal body or authority.
3. Utilise the incidental and accidental powers, when he takes some power from other authority.

³ Section 45, Government of India Act, 1935, "45 (1) – If at any time the Governor-general is satisfied that a situation has arisen in which the government of the Federation cannot be carried on in accordance with the provisions of this Act, he may by Proclamation-" source at: 'The Hindu Centre for Politics and Public Policy', <https://www.thehinducentre.com/the-arena/current-issues/article26618545.ece/binary/ukpga_19350002_en.pdf>

4. Suspend any parts or whole of the Government of India Act, that can be done.
5. Take over the legislative power with him.

But Governor General does not have the power to take federal court power. Proclamation ceases to exist within six months from the date of proclamation came into existence, but with legislative approval, it may extend to twelve months. A proclamation of emergency should not extend more than three years, it is subject to amendment, and the amendment should not destroy the whole federal thing in nature, this restriction to amendment is also mentioned in this section. A law is made when the proclamation is existing, that law is in effect two years from cessation or earlier if the law is repealed or any law is enacted by the appropriate government. Another type of national emergency is stated under section 102 of the Government of India Act, 1935. These proclamation grounds differ from section 45 grounds. When security is threatened by war or internal disturbances, Governor General can proclaim the emergency to the whole of India (British Raj).

Governor General has similar rights and limitations noted in section 45 of the Government of India Act of 1935. Section 67A gave several powers to Governor General to authorise expenditure for the safety and tranquillity of India. Section 67B stated that Governor General has the power to direct any law to come into force even without the allowance of His Majesty and section 72 gave power to make ordinances which shall exist six months from came into force. Governor General should communicate with the secretary of the state and this proclamation should be laid before the parliament. The proclamation can be revoked through the subsequent proclamation.

- ***Constitution Of India, 1950***

After the independence, eminent nationalists as well as jurists make the Constitution of India, in 1950. It is the law of the land it contains every action of the three organs of the government, federal, democratic and people's rights & duties, it contains a lot of things which is needful to the nation. Among these, Articles 352, 354, 358 and 359 deal with the proclamation of national emergency. Through these Articles President of

India hold the power to proclaim a national emergency. Grounds for an emergency are the satisfaction of the President for the grave situation that exists or there is an imminent danger of such a situation due to war or external aggression or internal disturbance.⁴

Whether the threat is for the security of India or any part thereof, the proclamation of emergency is the whole of India. The other rights given under part III of the Indian constitution will be suspended as well its enforceability, in accordance with the ordinance issued by the President. Whereas, enforcement of Article 19 will be automatically suspended and the state is at its discretion to enact laws in violation of Article 19, and such law enacted and acts done under it, during the period of emergency, cannot be questioned in court of law even after the emergency ceases, provided, the enacted law would cease as soon as the emergency ceases.⁵ President can advise any state related to any financial matter, it exists till the end of the fiscal year or the end of the emergency, whichever comes first that will cease the right of this advice. Parliament can make law even in state list. President should lay this proclamation before parliament to get approval. From the proclamation of emergency two months alone it will be in force, then it will cease to exist if no such approval was given by parliament.

But with the parliament's approval, it may extend, no such limitation is in Constitution. In one case, where there is dissolution of Lok Sabha, approval should obtain within 30 days from the date of the first sitting, till that proclamation is in force, provided there is prior approval is bought from the Rajya Sabha. The proclamation can be revoked through the subsequent proclamation. Acts of the legislature and executive violate fundamental rights, cease as soon as the emergency overs, except, things done or omitted during emergency.

⁴ Article 352, Constitution of India Act, 1950 (as it was in 1950)

⁵ Article 358, Constitution of India Act, 1950

V. MAJOR AMENDMENTS IN CONSTITUTION

- *38th Amendment Act, 1975*

In 1975, a major change was made in emergency provisions, through the 38th Constitutional Amendment Act of 1975. This amendment gave way to proclaim different emergencies in the same period. It removes the ambiguity, which existed from 1950 that is related to Article 19 related law dealt in Article 359 stated that acts of legislature and executive violate fundamental rights, and cease as soon as the emergency overs, except, things done or omitted during an emergency. But it did not indicate anything about Article 19 because it was suspended during the proclamation of emergency. Through this amendment, article 19 also includes among the other rights that means any acts of the legislature and executive violate fundamental rights cease as soon as the emergency overs, except, things done or omitted during the emergency. Further, it stated that the satisfaction of the president is final and shall not be questioned in any court and no court has jurisdiction to entertain this matter.

- *42nd Amendment Act, 1976*

Indira Gandhi, former Prime Minister of India made a mini-constitution through the 42nd Constitution Amendment Act in 1976. Due to this amendment, the president got the power to proclaim an emergency in the whole part of the country or of such part of the territory. During the emergency period union can give directions and the Parliament can enact laws for the state in which an emergency is declared or other states who are in danger of it. Till the 42nd Constitution Amendment Act of 1976, no such provision to vary the proclamation but this amendment gave the power to vary the proclamation through the subsequent proclamation.

- *At Present After 44th Amendment Act, 1978*

After the emergency period came to an end, a new government was formed and through the 44th Constitution Amendment Act, 1978, they restore the major things which were amended in the 42nd Constitution Amendment Act, 1976. Emergency provisions have no exception in this restoration process. Through this amendment,

the president can proclaim an emergency as in the earlier scenario, but the word internal aggression was replaced by armed rebellions. Before proclaiming the emergency proclamation, they should obtain written consent from the Cabinet Ministers. In any situation Articles 20 and 21 can not be suspended, other than this through proclamation that may suspend. The right to enforce part III is suspended by the proclamation, except for articles 20 and 21. The union can give directions to any state. The President can direct the exercise of Art 268 to 279 (fiscal provisions) in the territory in an emergency period. The union can give directions and the Parliament can enact laws for the territory in which an emergency is declared or other states who are in danger of it.

The legislative and executive actions should have connections with the emergency proclaimed. Any law made during the emergency period that should have a connection with the emergency proclaimed, when there is no nexus between the emergency and laws or any legislative or executive actions are not protected under these provisions. If there is no nexus with an emergency, after the emergency it can be challenged before a court of law. Laid before the Parliament and passed by a majority of the total members of the houses and by the majority of two-thirds of the members present and voting is essential to get the approval of parliament. The president should revoke the proclamation if there is a resolution is passed in disapproval of the proclamation - a resolution followed by a notice of 1/10th of the members in writing and signed to the Speaker or President, whereby a special sitting in 14 days shall be issued.

A proclamation ceases to exist after the end of one month. After getting approval from the parliament, it's extended to six months. If any abnormal situation like dissolved Lok Sabha, election period or any such situation, approval of parliament should obtain within 30 days from the first sitting of the house. The extension of the emergency period is also six months, like getting approval for the proclamation process, all necessary steps should be taken and get a two-thirds majority from both houses. Acts of the legislature and executive violate fundamental rights, cease as soon as the emergency overs, except, things done or omitted during the emergency.

Acts of the legislature and executive violate Article 19, cease as soon as the emergency overs, except things done or omitted during an emergency. The restriction of the judiciary to entertain the case regards the president's assert was removed through this amendment.

VI. ANALYSIS

India, an ancient civilised country, which was searched by a lot of Western countries, was governed by British King. When India was under the British it emerged as a constitutional country, even though the Government of India Act of 1935 was not named a constitution, it has constitution features. In this act, emergency provisions gave enormous power to the Governor General. The Governor General can do whatever he thinks, and he may even invalidate Government of India act for a certain period of time. So, Governor General is the authority to decide any matter, but federal court power is safeguarded by the Government of India Act. But if they wish to take over, they can easily make this act invalid and then take over any power even the federal court power. Unfortunately, after independent constitution makers take the Government of India Act provision terminology as it is, with some of the changes.

It is not an explainable matter, because no one has experienced or have any idea about the emergency period. so that, Governor-general was replaced by the president and some of the protection was given through fundamental rights, getting approval process, judicial scrutinising process and constitutional mechanism. It did not contain any of the maximum period of emergency, constitution-makers may think emergency provisions for extraordinary situations, so restriction should not be the barrier in that situation. This is true because, in India China's wartime, more than 5 years of emergency is in force. But unfortunately, through the 39th and 42nd constitutional amendments, judicial scrutinization was ceased and fundamental rights were restricted in a massive manner, which is not needed. Finally, on 25th June 1975, a proclamation was made to impose an emergency because of internal disturbance. From the day of the proclamation, people are stunned by the misuse of emergencies in all manners. Due to the people's continuous effort, this emergency declared was revoked and through election new government was formed, which further amended

all the emergency provisions. But after the new amendment, emergency became a very rigid, and it may cause massive trouble in such a dangerous situation.

VII. CONCLUSION

“I do not believe that a democratic society must acquiesce in its dissolution”

Jayprakash Narayan (1975)

In Tamil, we have a proverb *“kathathu kai man alavu kallatathu ulagalavu”*, which means that whatever we have learned is the quantity of sand in our hand, but the unlearned things are equal in quantity of this world. In case of emergency, the current day provisions are built out of a very lengthy process, but even today it is a debating point. And so, a maximum of study is needed to improve the efficiency of Indian constitution provisions about emergency. Currently, emergency powers are the very rigid as well as they are very much varied from the intention of constitution-makers.

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