

LEGALFOXES LAW TIMES

***AN IMPERATIVE
STUDY OF
EMERGENCY
PROVISIONS OF
THE INDIAN
CONSTITUTION***

1. INTRODUCTION:

The term emergency means “Something dangerous or serious, such as an accident, that happens suddenly or unexpectedly and needs fast action in order to avoid harmful results”.¹

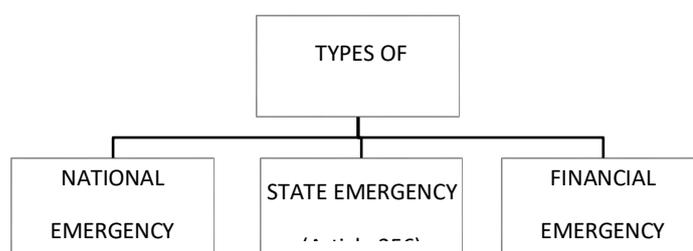
In India, the emergency provisions have been borrowed from Germany. In the continuation of the research paper, the researcher seeks to analyse the Indian scenario with respect to emergency provisions with that of Germany. The paper also seeks to emphasise on various emergency proclamations that have led to the reshaping of the use of emergency provisions.

In this research paper, the researcher strives to compare the emergency provisions of India and that of Germany.

1. EMERGENCY PROVISION IN INDIA

1.1. TYPES OF EMERGENCY PROVISION:

The emergency provisions are mentioned from article 352 to article 360 under part XVIII of the Indian Constitution. There are three types of emergencies



1.1.1. NATIONAL EMERGENCY:

As per article 352, The President can declare National Emergency on the following three grounds:

WAR: Armed fighting between two or more countries or groups². Also applicable to circumstances where two or more countries have made a formal declaration of war to happen.

¹ Dictionary.cambridge.org. (2019). *EMERGENCY* | meaning in the Cambridge English Dictionary. [online] Available at: <https://dictionary.cambridge.org/dictionary/english/emergency> [Accessed 15 Apr. 2019].

² Dictionary.cambridge.org. (2019). *WAR* | meaning in the Cambridge English Dictionary. [online] Available at: <https://dictionary.cambridge.org/dictionary/english/war> [Accessed 17 Apr. 2019].

EXTERNAL AGGRESSION: Even though the concept of external aggression can be widely interpreted, in this scenario it can be taken as one country exerting force on another without a formal declaration.

ARMED REBELLION: As the term suggests, armed rebellion refers to open revolt or rebellion against the government by use of force. Earlier was termed as an **internal disturbance**. After the amendment, the name changed to armed rebellion.

The same can also be categorically divided on the basis of internal emergency and external emergency. That is, if an emergency is proclaimed due to war or external aggression, it is an **external emergency**. If an emergency is proclaimed due to armed rebellion, it is an **internal emergency**.

PROCLAMATION OF NATIONAL EMERGENCY IN INDIA

1st: 26th OCTOBER 1962 - JANUARY 1968 (CHINA ATTACKS ON INDIA)

- ❖ Due to China attacking India, the first emergency was proclaimed by the president on 26th October 1962 by use of article 352 (on grounds of external aggression).
- ❖ Article 359 was also in force by which the fundamental rights of citizens were also suspended.
- ❖ Citizens were not given the right to approach courts for the enforcement of their fundamental rights.
- ❖ More than two thousands of Indian citizens were arrested of which majority constituted of Leaders of opposition, members of various parties etc. on grounds of activity against national interest.
- ❖ Even after the Indo-China war came to an end, the emergency proclamation was not lifted.
- ❖ In April 1965, there was an armed conflict between India and Pakistan which changed into war in September 1965 and later subsided after the Tashkent agreement (At this period, the emergency that was proclaimed in October 1962 was still in force).
- ❖ Due to the misuse of Emergency Provisions at a later point of time, public campaigns and appeals began to pile up along with an International focus to India
- ❖ The government lifted emergency in January 1968.

2nd: 3rd DECEMBER 1971 – 25th JUNE 1975 (INDIA CHINA WAR)

- ❖ Due to armed conflict between India and Pakistan, an emergency was proclaimed for the second time on 3rd December 1971 by use of article 352 (on grounds of external aggression).
- ❖ Parliament enacted laws such as Maintenance of Internal Security Act, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), Government Defence of India Rules (main aim of these activities was prevention of detention).
- ❖ Huge misuse of power as the alarming number of arrests, custodial deaths and encounters were reported.
- ❖ Even after the war came to end, the declaration of Emergency was not revoked.
- ❖ In November 1974, President states that for the sake of security of India, citizens cannot enforce fundamental rights in courts as under MISA.

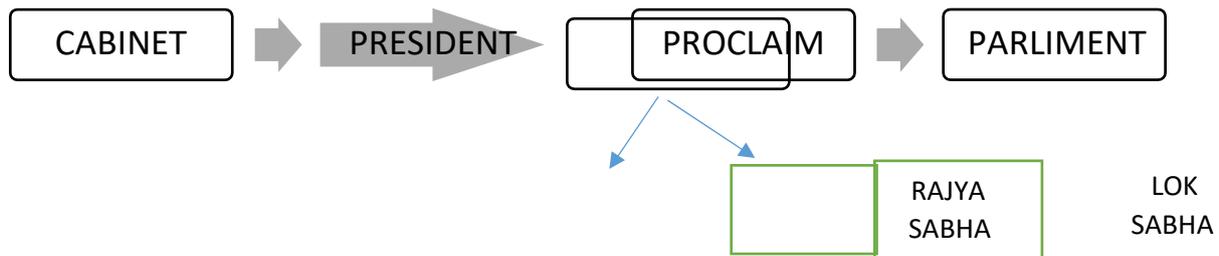
3rd: 25th JUNE 1975 – 21st MARCH 1977 (INTERNAL DISTURBANCE)

- ❖ **BACKGROUND:** STATE OF UTTAR PRADESH V. RAJ NARAIN³: In an election petition, the Allahabad High Court held Indira Gandhi guilty for corrupt practices as a result of which she was disqualified from holding any public office for the next six years. Indira Gandhi went for an appeal in Supreme Court where she could only obtain a conditional stay and SC was on vacation. Opposition party started demanding for her resignation. Widespread agitation was showcased whole across India.
- ❖ On the night of 25th June 1975, without consulting the council of ministers, Indira Gandhi (Prime Minister) sent a letter to the President, asking for a declaration of Emergency. The President, without the aid and advice of the council of ministers, declared Emergency on grounds of Internal Disturbance as under article 352.
- ❖ Constitutional amendments were made, fundamental rights were curtailed, political opponents were arrested, and insensitive government programmes were carried out- like clearing of slums, family planning etc.
- ❖ Censorship of press was made as a result of which the press could not report anything that would create hatred against the government.

³ 1975 AIR 865, 1975 SCR (3) 333

- ❖ Powers of President was altered. That is, the president's satisfaction was made to be final and conclusive and they cannot be challenged.
- ❖ Misuse of powers was prevalent with the backing of MISA Act.
- ❖ Finally, on 23rd March 1977, the emergency was revoked.

APPROVAL OF EMERGENCY



The cabinet (constitutes of Council of Minister and Prime Minister) has to pass notion if it is satisfied with the grounds that are mentioned in article 352. If they are satisfied, they give written advice to the president regarding the same. If the president is also satisfied with the same, then the proclamation of an emergency can be made. Once the emergency has been declared, it goes to the parliament for further approval as to decide the tenure of its existence. For the continuation of existence, both the houses of the parliament shall have to pass it with a special majority.

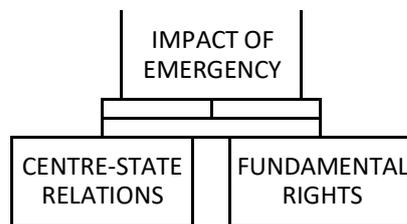
If that happens, then the proclaimed emergency shall remain valid for the next six months and not more than. In order to extend the same, the President will have to follow the same procedure from the beginning. If one only house passes the same or if no action is taken on behalf of the houses, then the proclaimed emergency shall exist only for one month.

REVOKE OF EMERGENCY:

After the 44th amendment, revoke of emergency was made easily resilient than its approval. There exist two methods for revoking of emergency:

1. If the president finds that the conditions for which the emergency was proclaimed do not exist, then he/she can revoke an emergency immediately without consultation.
2. If Lok Sabha disapproves emergency during its approval, an emergency shall be revoked from that day on.

IMPACT OF EMERGENCY:



CENTRE-STATE RELATION: As mentioned under article 353, the centre can give directions to the state government regarding its governance and as per 353(b), can also make laws on behalf of the state government on aspects mentioned in the state list.

FUNDAMENTAL RIGHTS:As per article 358, as soon as National Emergency commences, automatically the fundamental rights that have been provided under Article 19 comes to an end. The president need not make a proclamation for this matter. But after the 44th amendment it was decided that only when the emergency is declared on grounds of war or external aggression, article 19 shall be suspended.

Article 359 states that the president, through a proclamation has the power to suspend all fundamental rights (article 12- 35). But after the 44th amendment article 20 and article 21 cannot be suspended at any time.

AMENDMENTS

38th Amendment: Amended article 352 and added the fifth clause. The president cannot be questioned with respect to the reasoning of the proclamation of fundamental rights and that the decision is final and conclusive. This was struck down after the 44th amendment. In the landmark judgement of MINERVA MILLS V UNION OF INDIA⁴, the central government took over Minerva Mills Ltd. and nationalised the same under Silk Textile Undertaking Act of 1974. Petitioners challenged 4 and 55 of the 42nd amendment. The judgement struck down section 4 and 55 of the 42nd amendment. Basically, the parliament cannot exercise its limited power to grant itself unlimited powers. This amendment was **struck down**. Present scenario

⁴ 1980 AIR 1789, 1981 SCR (1) 206

is that the reasoning of the president to proclaim emergency can be subjected to judicial review.

39th Amendment: Came into being when there was already a case regarding the same in Allahabad High Court. This amendment was framed in order to set guidelines for deciding election dispute cases. After this amendment, the elections regarding the president, vice-president, prime minister and the speaker cannot be questioned in court and thus not subjected to judicial review.

42nd Amendment: This amendment was brought in during the time of emergency where a maximum number of opposition leaders were already in jail. The main aim of this amendment was to considerably reduce the power of the judiciary. This amendment stated that parliamentary amendments cannot be questioned. Considerable powers of the state government shall be transferred to the central government. Three words of the Indian preamble – *socialist, secular, integrity* was added to this amendment. Article 31(d) was added to the constitution that talks about the prohibition of Anti-national activities. As per this article, any laws that are made in order to root out anti-national activities cannot be questioned with respect to its reasonability. This amendment was struck down by section 2 of the 43rd amendment.

44th Amendment: The term *internal disturbance* was very vague and its application can be misused. Thus this term was replaced by *armed rebellion*. For the proclamation of emergency to sustain, and only a *simple majority* was needed. The requirement for the same was changed to a *special majority*. In the case of ADM JABALPUR V SHIVKANT SHUKLA⁵, it was held that as at the time of emergency, the fundamental rights remain suspended, the writ of habeas corpus cannot be taken into consideration. But as per this amendment, even during emergency article 20 and 21 cannot be suspended. That is, courts can issue the writ of habeas corpus even during an emergency. It was also held that judicial review can be done on the president's reasoning for the proclamation of emergency.

1.1.2. STATE EMERGENCY:

As per article 355, it is the duty of the Centre to protect the states from external aggression, internal disturbance. The Centre also has to ensure that the state is respecting the constitutional provisions and that it is acting in accordance with it.

As in under article 356, talks about ways by which state emergency can be proclaimed.

⁵ 1976 AIR 1207, 1976 SCR 172

1. When the governor sends a written report conveying that the state is not being governed properly.
2. When the president is satisfied through some other means that a state is not following the provisions as mentioned in the constitution.
3. President also has powers under article 365 that is the state is not following the directions of the centre, the president can say that the state is not functioning as per the provisions as mentioned in the constitution.

PROCLAMATION OF STATE EMERGENCY IN INDIA

15th DECEMBER 1992 (DEMOLITION OF BABRI MASJID)

- ❖ On 6th December 1992, when there was the demolition of Babri Masjid in Ayodhya, Uttar Pradesh. During this time there was complete chaos and religious intolerance displayed in the whole of the country.
- ❖ As a result of which state emergency was proclaimed on Madhya Pradesh, Rajasthan and Himachal Pradesh, thereby dismissing its government as these states were not working in accordance with the concept of secularism.

IN KARNATAKA

- ❖ In the landmark judgement of S.R. BOMAI V UNION OF INDIA⁶, Supreme Court states that the federal structure of India cannot be compared with that of any other country and that the president's satisfaction for the proclamation of emergency is subject to judicial review.

APPROVAL AND TENURE:

Governor has to send a letter to the president stating that the state is not functioning as per the constitutional provisions. This proclamation shall remain valid until Two months from the date of its declaration. It then goes to the parliament and then, if the same is approved there, then proclamation shall remain valid for six months. If the same is not accepted or consented in the parliament, the proclamation shall only remain valid for two months. State emergency can only exist for a maximum period of three years. But in the meanwhile, the parliament has to

⁶ 1994 AIR 1918, 1994 SCC (3) 1

approve it every six months. For a state emergency to exist beyond a year, there needs to be two criteria's:

1. National emergency needs to be in operation in India
2. The election commission certifies that there are difficulties in the state for not conducting an election for the legislative assembly.

REVOCATION

President can revoke the state emergency at any point of time without the consultation.

FINANCIAL EMERGENCY:

As mentioned in article 360, a financial emergency can be proclaimed if the nation faces a threat regarding its financial stability. The same can be revoked at any time after its proclamation. The tenure and nature of existence is the same as that of state emergency. When declared, all the financial powers shall flow to the central government.

EMERGENCY PROVISIONS IN GERMANY

In Germany, there exists a basic law constitution. It was drafted with an intention to actually act as a temporary mechanism but even after the unification of Germany, it is still prevalent in its temporary form. For the purpose of this research paper, it is conveniently mentioned from henceforth as German constitution.

Emergency provisions have been mentioned in the German Constitution as under Article 81, 91, 115(k) and 115(l). As India has borrowed emergency provisions from Germany, emergency provisions are very much alike in both countries.

CONCLUSION:

It can be concluded that emergency provisions form an integral part of the Indian Constitution. And that even though the Centre and State relations are strained and that certain fundamental rights of citizens are to be curtailed, it is for the greater cause of national integrity and security. Recent amendments have also helped in the non-misuse of

the articles, thereby facilitating in the smooth running of thenation.