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NATIONAL EMERGENCY AND THE CONSTITUTION OF INDIA

by

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I. INTRODUCTION.

The extraordinary powers conferred on the executive by the emergency-provisions of the Constitution had created misgivings in the minds of some of the Constitution-Makers[1] themselves. They feared that the emergency provisions might endanger democracy and undermine the dignity and worth of the individual. The havoc that Hitler had wrought on Germany with the help of emergency-powers was still fresh in their memory. But the authors of these provisions, who had just passed through a total war and were living in a state of social upheaval, political crisis and human suffering, had more than an anxious concern for social stability and national security.[2] Although they stoutly defended these provisions, one of them expressed the hope that these provisions might never be used and that they would remain a dead letter. They have not remained a letter. From 1962 India was under the shadow of emergency for nearly fifteen years.

So it is necessary now to apprise the content and extent of these provisions in the light of the operation of these provisions during emergency and to assess their impact on Constitutional democracy and individual liberty. As England and America have met successfully the emergency caused by the Ist and 2nd world wars, it is necessary to see how they reconciled the regimentation demanded by a total war with the liberalism pervading individual liberties.

The American Constitutional Law, state-practice and juristic works were the subject of debate by the Constitution-Makers in India.[3] Corwin was the oracle constantly cited,

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consulted and quoted by Alladi Krishna Swamy Iyer. The influence of English decisional law on war-power has been more than persuasive on the Indian Counsel and the Court. Liversidge v. Anderson[4] continues to be the staple-diet of the Indian judge.

So this paper proposes to appraise the Indian emergency provisions in the light of their operation and against the background of the English and American cases.

II. ANATOMY OF THE PROVISIONS.

Article 352 authorizes the President to proclaim emergency when he is satisfied that war, external aggression or internal disturbance, or a threat thereof, endangering the security of the whole or a part of India has created a grave emergency in the country. The satisfaction that Article 352 speaks of is the President's subjective satisfaction. This Article does not also insist on actual occurence of war, external aggression or internal distrubance. On its own the President's proclamation will remain in force for only two months. On ratification within two months by Parliament, the proclamation will remain in force until its revocation.

The proclamation of national emergency casts a shadow on fundamental rights. According to Article 358 the instant effect of this proclamation is a complete suspension of the seven freedoms in Article 19. Thus suspension leaves the executive and the legislature free during emergency to ignore these freedoms, which include freedom of speech, assembly and association. Article 359 empowers the President to suspend the right of access to courts for the enforcement of any or all of the fundamental rights. This order, which might be confined to a part of extended to the whole of India, must be placed before Parliament.

It might be noted that England[5] dispensed with suspension of the writ of habeas corpus and used the need for Parliamentary ratification of the illegal acts done during emergency as an instrument of control over the executive. Article I Section 9 of the American Constitution authorized suspension of the writ of habeas corpus during war. Relying on the location of Section 9 in Article I, which spells out the powers of the American Congress, the American Supreme Court has held that only Congress was competent to suspend this writ.[6] Though England and America conced'd to the executive extensive emergency powers, they did not free the exercise of these powers from institutional or constitutional control. Judicial review of exercise of these powers was, therefore, continued. Thus the executive in these

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countries was answerable during emergency to an aggrieved individual in a court of law, which, though sensitive to the security of the state, was not insensitive to the dignity and worth of the individual?

III. AVENUES OF ABUSE

Although Part XVIII of our Constitution spells out in detail the emergency powers, it does not define emergency. This means that emergency is what the President says it is. Article 352, thus, leaves the President free to proclaim emergency on the basis of an imaginary or a trivial threat to the security of the country. An emergency, genuine or otherwise, may outlive the necessity. The emergency power may bear no relation to the degree of emergency prevalent in India. This power may be used against Indians. All this is not a mere theoretical possibility.

There are, however, safeguards in Article 352 against such abuse or misuse of the emergency-provisions. Unlike the Government of India Act, 1935, the Constitution of India confers the power to proclaim emergency, not on the Governor of a State but on the President, the highest dignity in the country who is on oath to protect and defend the Constitution. He can exercise his powers and functions only on the advice of the Council of Ministers. He is liable to impeachment for subverting the Constitution. If, in spite of all these checks and controls, he misuses or abuses his power, Parliament can revoke his proclamation under Article 352. Alladi drew the attention of the House to these controls over the President and said: "Parliament has a right to take any action it likes with reference to the course adopted. (So) there can be no possible objection to... Article (359)[8]." These safeguards are reinforced by the sanction of the democratic process, which might descend on the ruling party like a namesis if it uses the emergency power for extraneous purposes.

It is unfortunate that this impressive array of safeguards has failed, partly in 1962, and 1971, and wholly in 1975. The emergency in 1962 and 1971 outlived the Chines aggression and Bangladesh crisis by years. The Parliament, responding to the lead given by the ruling party, repeatedly rejected the popular demand for revocation of emergency. Nor did it check the use of this power for purposes extraneous to emergency. In June 1975 the President proclaimed emergency on the advice of the Prime Minister only, though Article 74 requires him to exercise his functions on the advice of the Council of Ministers. The Council of Ministers, though slighted by the Prime Minister, ratified her decision. The Parliament approved of this proclamation and went beyond the brink of

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constitutionality to oblige the Prime Minister by enacting extra-ordinary pieces of law. Thus all these functionaries under the Constitution failed to discharge their duties. The cumulative impact of this colossal failure is too recent and too well known to be recounted here. The nemesis of the democratic process descended on the ruling party after a nightmarish experience of nearly two years.

IV. JUDICIAL CONTROL ABDICATED.

Does the constitution contemplate judicial intervention in such a situation to correct and control the executive ? The Supreme Court said in Makhan Singh[9] that "How long the proclamation of emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of emergency are matters....left to the Executive." In Bhutnath[10] Krishna Iyer, J. treated a challenge to the validity of continuance of emergency as a political question not open to judicial review. The Supreme Court overruled Ghulam Sarwar[11] to hold that the validity of a Presidential order suspending the right of access to courts was not open to challenge under the fundamental rights whose judicial enforcement it sought to suspend.[12] Only Hidayatullah, C.J. emphasised in his dissent the need to retain a lever of judicial control for use in an extreme case.[13]

The high water-mark of judicial passivism was reached in Shukla.[14] With Khanna, J., dissenting, the Supreme Court held that as a result of the Presidential order of June, 1975, issued under Article 359 a detenu had no locus standi to challenge and the High Court, no jurisdiction to set aside, a detention on the plea that it was illegal or malafide. As this decision was contrary to Makhan Singh,[15] the Court distinguished it from Shukla on the basis of the phraseological difference in the Presidential orders of 1962 and June 1975 involved in those two cases. Although both these orders suspended judicial enforcement of the rights to equality, life and personal liberty, only the order of 1962 contained this clause:

> "(if a person) has been deprived of such rights under the Defence of India Ordinance, 1962, or any rule or order made thereunder."

The court relied on the absence of this clause from the order of June 1975 to deviate from Makhan Singh to deny relief to the detenus even though their detention was illegal or malafide, from Makhan Singh. The other sub-propositions in Shukla that Article 21 is the sole repository of personal liberty and the emergency-provisions, the sole abode of rule of law during emergency merely wait on the main proposition.

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It is submitted that as long as Makhan Singh stands, the Supreme Court cannot disregard the rule therein that a challenge to the validity of a detention on the ground of malafide or illegality was not hit by Article 359. Gajendragadkar, J.(Later C.J.) pointed out in Makhan Singh that Article 359 would come in the way of a detenu if he challenged the validity of an order, which was bonafide and intra vires the law, on the ground that it violated a fundamental right, the judicial enforcement of which was suspended by the President. As the Presidential order takes its scope from Article 359, it cannot rise higher than that Article. So neither Article 359 nor the order thereunder takes away the High Court's jurisdiction or affects the detenus locus standi so long as the allegation is that the order of detention is malafide or illegal. The fact that in a few cases the court invoked the Presidential order alone to set aside the illegal order of detention does not in any way detract from the rule in Makhan Singh. Otherwise in those cases the court would have dissented from the construction of Article 359 by Gajendragadkar, J. in Makhan Singh.

In view of this, the Shukla Court should have gone to the crux of the issue to see whether the rule in Makhan Singh fitted into the language and context of Article 359 or crippled or obstructed the war-efforts of the government. Unfortunately the court merely skirted around the rule and failed to give any sound reason for not following it.

Some of the judges raised the plea in Shukla that if, in addition to the personal liberty in Article 21, there was a common law right to personal liberty, the Presidential order suspending the judicial enforcement of personal liberty in Article 21 would be an exercise in futility. For a detenu might get the common law right enforced by a High Court under Article 226. These judges also said that the common law right was merged in the fundamental right when the constitution came. It is submitted that when the order of detention is intra vires the law and bona fide, Article 359 and the Presidential order effectively bar a challenge to that order on the ground that it has infringed a fundamental right specified in the Presidential order. As Article 359 is inapplicable when the detention-order is ultra vires the law or mala fide, the bar in the Presidential order does not come in the way of a person detained under such an order. So to say that in the latter case the Presidential order is an exercise in futility is to say that Article 359 is futile. When the constitutional and statutory rights to habeas corpus can, as stated in Makhan Singh, co-exist, the fundamental and the common law rights to personal liberty can also co-exist.

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To conclude, while the proposition in Shukla flies in the face of a time-honoured case like Makhan Singh and the other cases that followed it, there was nothing in Indian Law or even in English or American decisional law to sustain it. In fact Ray, C.J. admitted that an English court would grant relief if the detention was illegal or male fide and that, despite the suspension of habeas corpus in America, other remedies were intact.[17] All this renders Shukla questionable. The merits of the case are, thus with the dissent of Khanna, J. which is free from the pressure and passion of the tumutuous times, and displays refreshing liberlism and a superb reasoning process. This shows that the proclamation and continuance of emergency, the assumption of emergency power and the detentions ordered are free from judicial control and subject to ineffective political controls.

V. DISTRUST OF THE PEOPLE.

Why did the framers of the constitution confer such power on the executive ? Alladi Krishna Swamy Ayyar's[18] spirited reply to the debate in the Constituent Assembly on the emergency provisions throws light on the intention of the Constitution-Makers. He said :

> We are envisaging a situation threatened by war, in a country with multitudinous people with possibly divided loyalties, through technically they may be citizens of India. We trust that the time will come when the citizens of India will not look to far off countries but we cannot proceed on the footing in regard to all the citizens of the country their loyalty is assured. Freedom of speech may be used for the purpose of endangering the state and resulting in crippling all the resources of the country.[19]

To reject the plea that the Indian Constitution, like the American Constitution, should confer on the legislature the power to suspend fundamental rights, Alladi said :

> During the civil war, President Lincoln suspended the writ of Habeas Corpus. In the American Constitution power is given to suspend the Habeas Corpus, but it is not mentioned whether the authority to suspend is the Congress or the President. But as a matter of fact the President did suspend the writ of Habeas Corpus during the civil war and the American people as a nation in their wisdom never questioned President's power.[20]

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Alladi made a bold prognosis:

> It(Article 359) will be the life of this Constitution. Far from killing the democratic constitution, it will save democracy from danger and annihilation.[21]

If Alladi's speech contains a clue to the intention of the framers of the constitution, the basic premise of the suspension of fundamental rights during the emergency is suspicion and distrust of the people. No commentary on the unity and solidarity shown by the people during India's hours of crises is necessary to say that time has invalidated this basic premise. Time has also been unkind to the bold prognosis of Alladi. The developments during the most recent emergency, framed for posterity by Kuldip Nayar, have shown that Articles 358 and 359 did not prove to be the life of the constitution. Kamath's fear that the executive might not justify the confidence reposed in it and that Article 359 was the key-stone of the arch of autocratic reaction has come true.

Further Alladi's reliance on Corwin prevented him from going to the American decisional law on war-power. Corwin is selective in his appreciation of cases. He does not try to view the decisional law in its organic whole. He relies heavily on Moyer v. Peabody[22] though the opinion of Holmes, J. in this case was sub-silentio over-ruled by Hughes, C.J. in a subsequent case, Sterling v. Constantin.[23] So Corwin's thesis, based on an eccentric exception like Moyer v. Peabody,[24] that a proclamation by the executive that the conditions were so acute as to create a state of insurrection was conclusive of the fact was contrary to a long line of decisions. The rule in Milligan[25] that "the constitution is a law for rulers and people in war and peace" and that no provision of the constitution "can be suspended during any of the great exigencies of government" is still valid. As observed by William O Douglas "The Milligan case has never been overruled".[26] It was, in fact, followed in Duncan v. Kahanamoku[27]. In short, Alladi's defence of suspension of fundamental rights during emergency reflected distrust of the people and inadequate appreciation of the American Constitutional law on war-power.

VI. CONCLUSION.

The failure of the safeguards in Article 352, the inability of the President, the Council of Ministers and the Parliament to control the vaulting ambitions of an overbearing Prime Minister, the suspension of fundamental rights based on distrust of the people, the ablication of judicial review of illegal or mala fide detentions by

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the Supreme Court, the eventual release of exercise of emergency power by the executive from constitutional control and the cumulative impact of all this on democracy and the welfare and happiness of the critics of the party in power warrant an amendment of the constitution. The amendment should seek to avert recurrence of an emergency like the one revoked recently. It is submitted that the following amendments may save posterity from the nightmare that oppressed out generation for nearly two long years.

(1) Article 352 should be amended to permit judicial review of proclamation and continuance of emergency. The period of operation of Presidential proclamation of emergency should be limited to one month. Approval of the proclamation by Parliament should be by not less than two thirds of the members present and voting. Article 352 should provide that continuance of emergency should be subject to review by Parliament every six months and that no emergency should be continued for more than three years at a stretch.

(2) Article 358 and 359 should be deleted from the Constitution. Personal Liberty and Freedom of Speech have been the targets of the regime of emergency in India.

It is necessary, therefore to see whether retention of these fundamental rights during emergency would obstruct the war-efforts of the government.

Freedom of speech, like all other fundamental rights, has been subordinated to public order and security of the state. So even during profound peace the state is free to override a fundamental right to protect social stability, public tranquility and state security. In Virendra[28] the Supreme Court upheld precensorship of the press during peace. The court said that "in the interests of public order" in Article 19(2), which deals with the restrictions on freedom of speech.

> "makes the ambit of the protection very wide for a law may not have been designed to directly maintain the public order or to directly protect the general public against any particular evil and yet it may be in the interests of public order or the general public as the case may be."[29]

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The Court held:

> "The court is wholly unsuited to quage the seriousness of the situation for it cannot be in possession of materials which are available only to the executive government. Therefore, the determination of the time when and the extent to which restrictions should be imposed on the press must of necessity be left to the judgement and discretion of the State Government....30.

If this is the scope of freedom of speech and the judicial attitude towards censorship of the press, is it necessary to suspend this freedom during war ? As observed by Holmes, J., when a nation was at war "many things that might be said in time of peace are such a hindrance to its (war) efforts that their utterance will not be endured so long as men fight" and "no court could regard them as protected by any constitutional right".[31]

Personal liberty as guaranteed in Article 21 can be taken away in accordance with procedure established by law. Article 22 empowers the state to order detention without trial during peace. In certain cases and under certain circumstances this detention may be continued for a long period and free from review by an impartial agency. Under entry 3, List III, a legislature may enact during peace a law of preventive detention to safeguard security of the state, maintenance of public order and maintenance of supplies essential to the community. Liversidge v. Anderson, which is not good law in England even during war, is good law in India even during peace. So the government may order, detention without trial during peace. Thus what was permitted in England during the 2nd World War with great reluctance is permissible in India during profound peace. How can such a fundamental right protect an alien or native enemy or obstruct war-effort ?

It is useful to note here[32] that Munshi's proposal for suspension of fundamental rights during emergency was rejected by the Fundamental Rights Sub-Committee on the ground that it would make those rights illusory. "This decision so perturbed Ayyar that he wrote a letter to B.N.Rau..."The recent happenings in different parts of India have convinced me more than ever," wrote Ayyar... "that all Fundamental rights guaranteed under the Indian Constitution must be subject to public order, security and safety, though such a provision may to some extent neutralize the effect of the rights guaranteed under the Constitution." Ayyar followed up this letter with a note to members of the sub-committee in which he suggested that

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if the rights were not made liable to suspension in times of emergency, the words "security and defence of the state or national security" be added to the already existing proviso". This means that subordination of fundamental rights to national security would serve the purpose of suspension of fundamental rights during emergency.

There is, thus, no doubt that retention of these rights does not in any way obstruct war-efforts. There is also no doubt that their suspension will leave a leeway for abuse and misuse of the emergency power. In his Alladi Krishna Swamy Memorial lectures[33] Setalvad drew attention to the misuse of the emergency caused by the Chines aggression. He said:

> The executive prefers to use instead of the normal law the Defence of India Rules which contain no safeguard whatever. The truth of the saying that the exercise of absolute power whets the appetite for it and leads to its continued exercise receives glowing support from these acts of the executive.[34]

The developments during the most recent emergency are too notorious to be recounted. The white paper on "Misuse of Mass Media During the Emergency",[35] the revelations[36] before the Shah Commission, the books by Kuldip Nayar and others, the death of Snehlata Reddy and the torture of Lawrence Fernandez bring into focus the need to save the succeeding generations from the scourge of such emergency.[37]

One may say with Gajendragadkar, J. in Makhan Singh that the ultimate remedy against arbitrary action lies in the existence of a vigilant public opinion. But Setalvad[38] tells us how "The ruling party backed by a disciplined and powerful majority in the Union Legislature has failed to take note of "the enlightened vigilant and vocal public opinion". During the recent emergency the nation was so effectively emasculated and the media of expression so carefully controlled that no voice was raised in public against the regime of emergency.

For these reasons proclamation and continuance of emergency should be subjected to more effective Parliamentary control and also to judicial control, in certain cases. These controls may save the nation from spurious emergency and prevent emergency from outliving the necessity that has called it forth. While no fundamental right comes in the way of the security of the state, suspension of fundamental rights renders the individual and the society defenceless and leaves a leeway for misuse and abuse of emergency power. Suspension of fundamental rights during emergency should, therefore, be dispensed with.

FOOT NOTES

1. See IV Constituent Assembly Debates, (hereafter C.A.D.) 1949, (Government of India Publication) 139 et.sq. Kamath said :
"We trust the executive implicity. God grant that our trust be justified."
He said that the British government in India, engaged in a life and death struggle during the Second World War, did not deny the writ of habeas corpus even to the national leaders crusading for India's independence. He, therefore, characterized Article 359 as "the key stone of the arch of autoratic reaction." See P.533. See also Granville Austin, The Indian Constitution, Cornerstone of A Nation, (1974, Oxford) 70-75. Austin notes "that the fundamental rights were "framed among the carnage of fundamental wrongs" and "from the point of view of a police constable". He also notes that Articles 358 and 359 "remained unpopular with the rank and file despite the assurances of A.K.Ayyar that the President would not act "in a spirit of vandalism" and the arguments of Ambedkar and others that the whole Article (359) has its source, if not its equivalent, in the power of the American Congress to suspend the writ of habeas corpus, and in the interim right to take such action. This provision continues to be disliked and feared a decade and a half later. Id. at 71, 72, 75.

2. Id. Austin, See 71.

3. IV C.A.D.546. Alladi Krishnaswamy Ayyar said:

"I do not know if Members of this House have read a recent book by Prof. Corwin, one of the greatest authorities on Constitutional law, on the President's powers." Alladi relies only on Corwin. Ambedkar is a little more cautious than Alladi. While Alladi asserts that the President Lincoln suspended habeas corpus during the civil war and "the people as a nation in their wisdom never questioned the President's power", Ambedkar said "But I think I am right in saying that while the power is left with the Congress, is also vested with what may be called the ad interim power to suspend the writ. My friends shake their heads (in dissent). But I think if they referred to standard authority Corwin's book on 'the President', they will find that this is the position."

Pandit Kunzru, a distinguished member, said:
I am sure he is familiar with Ogg's Government of America. Perhaps he will regard the book as a standard book. Ambedkar: Yes. That is not the only book. There are one hundred books on the American Constitution. I am certainly familiar with some fifty of them.

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This interesting interlude betrays an inadequate appreciation of the importance of a proper comparative study of the Constitutions at this fateful hour in the history of India. None of these outstanding lawyers of their times found it necessary to turn to the American decisional law.

4. Liversidge v. Anderson (1941) 3 All E.R. 338.

5. Sharpe, R.J. The Law of Habeas Corpus (Oxford, 1976)92-93.

6. Ex Parte Merryman, 17 Fed. Cases 114, 152 (1861)

7. Sharpe, L. Supra n. 5, See 96. He says:

(O'Brien case) "does demonstrate that the courts may intervene where a statutory power is exercised for an improper purpose". He further says that despite the provision in the 1939 regulations that "any person detained in pursuance of these Regulations shall be deemed to be in lawful custody, " "it has been consistently held that such a phrase does not preclude the courts from determining whether the Minister has acted within the powers conferred in the particular case.

8. Supra, n. 3, at 545.

9. Makhan Singh v. State of Punjab, AIR 1964 SC 381 at 402.

10. Bhutnath v. State of West Bengal, AIR 1974 SC 807.

11. Ghulam Sarwar v. Union of India, AIR 1967 SC 1335.

12. Yakub v. State of Jammu and Kashmir, AIR 1968 SC 765.

13. Id. at 771.

14. A.D.M. Jabalpur v. Shukla, AIR 1976 SC 1207.

15. Supra n. 9.

16. Ibid.

17. Supra n. 14 at 1223. As observed by Sharpe on the surface judicial review of the actual exercise of the power to intern is very much a matter of interpretation but underneath very much a matter of judicial attitude. See Supra n. 5 at 97. Although the English Courts have displayed more concern during war for national security than individual liberty, no where have they freed illegal or mala fide detentions from judicial control. In one case the court said that where there was a malicious abuse of power, even an act of indemnity would not help the detaining authority. So Wright v. Fitzgerald.

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In India in Ananda Nambiar the Supreme Court said that the Presidential order under Article 359 suspending enforcement of fundamental rights should be construed in favour of the rights of the individuals. And yet the Shukla-court handed down a unique decision immunizing a mala fide or an illegal detention from judicial control.

18. Supra n. 1 545 - 547.

19. Id. at 545 - 546.

20. Id. at 54 .

21. Id. at 547.

22. Moyer v. Peabody 212 U.S. 78(1909).

23. Sterling v. Constantin 287 U.S. 378 (1932).

24. Supra n. 22.

25. See Ex Parte Milligan, 17 Fed. cas. 114(1861).

26. William O.Douglas, The Right of the People(Pyramid Books, 1961) 132.

27. Duncan v. Kohanamaku, 327 U.S. 304 (1946).

28. Virendra v. State of Punjab, AIR 1957 SC 896.

29. Id. at 890.

30. Id. at 900.

31. See Schenck v. U.S. 249 U.S. 47(1919).

32. For this paragraph I am indebted to Austin, Supra n.1, 79.

33. Setalvad, M.C.Grave Emergency And Emergency Arising Out of The Failure of the Constitutional Machinery In A State, (University of Madras, 1956).

34. Id. at 11.

35. White Paper on Misuse of Media During The Internal Emergency, (August, 1977, Government of India Publication) See especially Chapter III from P.22 for the enforcement of censorship.

36. Kuldip Nayar, Judgement (Vikas, 1977) See especially 124-25 for the torture of detenus, 150 for a list of published High Court judges.

37. Supra n. 9.

38. Supra n. 33 at 11.