Constitution and Democracy

An Indian Experience

N M Ghatate

EMERGENCY, CONSTITUTION AND DEMOCRACY

AN INDIAN EXPERIENCE

Dr. N.M. Ghatate

SHIPRA

ISBN: 978-81-7541-578-2

First Published in India in 2011

Emergency, Constitution and Democracy: An Indian Experience

Published by:
SHIPRA PUBLICATIONS
H.O.: LG 18-19, Pankaj Central Market, Patparganj,
I.P. Ext., Delhi-110092, Tel: 91-11-2223 5152, 2223 6152
Br.Off.: 4617/18, Ansari Road, Darya Ganj,
New Delhi-110002, Tel: 6594 6453, 9810522367
E-mail: info@shiprapublications.com
www.shiprapublications.com

Dedicated

To those inside and outside the prison who with undaunted courage and sense of humour carried out valiant struggle to restore democracy.

PREFACE

Since the adoption of Constitution in 1950, the Emergency was declared on the ground that the security of India was gravely threatened by external aggression twice when the Chinese hostilities erupted in 1962 and the Indo-Pak war of 1971 and on the ground of internal disturbance in 1975, better known as Internal Emergency.

The Constitution also provides for take over the administration of State Governments where there is a break down of constitutional machinery such Emergency has been proclaimed for more than hundred times. It also provides for financial Emergency whereby the financial stability and credit of India is threatened but such Emergency has never been proclaimed.

The net effect of Proclamation of any one of the Emergency is that the central government becomes all powerful and the federal character of the government of the country is kept in cold storage.

It is significant to mention that the 44th Constitutional amendment the Presidential proclamation from suspending right to life and liberty and to prevent a person from being prosecuted twice for the same offence has been deleted and checks on use of preventive detention laws are incorporated to put civil liberty on stronger ground.

The focus of this book is to study the Emergency powers when Emergency is proclaimed on ground grave security of India with emphasis on Internal Emergency of 1975. The experience of working this Constitution for six decades has shown that the Emergency powers are used longer than conditions warranted and abused particularly during the 1975 Emergency. And every time preventive detention laws and Defence of India Rules were employed to silence opposition.

This book begins with Introduction–Chapter-I; Constitution Assembly Debates on Emergency provisions are included in Chapter-II; Emergency in Operation with emphasis of Internal

Emergency is analyzed in Chapter-III followed by Condition of Detention and Martial Law in Chapters-IV and V. The 44th Constitutional Amendments to combat unprecedented explosive situation in Punjab are dealt in Chapter-VI. Preventive Detention and Constituent Assembly Debates on the subject are examined in Chapter-VII. The final chapter Conclusion includes recommendations.

During the operation of Internal Emergency I was in the midst of filing and arguing numbers of *habeas corpus* petitions, in the various High Courts and the Supreme Court and met various political leaders inside and outside jails. I have recorded my experiences and wit and humour during the nineteen dark months. Asterisks are given about the bit I was told by others. I may be forgiven as my name often appears particularly during the Operation of Internal Emergency in Chapter-III.

The foot-notes are given at the end of each Chapter, three Appendices are given in the end; Appendix-I contains Emergency powers in the Government of India Act of 1935, the Constitutional Amendments from time to time to the Constitution of India and the Preventive Detention Law, *viz.*, the Maintenance of Internal Security Act and the Conservation of Foreign Exchange and Prevention of Smuggling Act during the Internal Emergency for ready comparison. Appendix II is the text of argument reported in *The Times* of London. Appendix-III is the text of the Editorial in *The New York Times* and the Analysis of the three judgments during the Internal Emergency are given in the Appendix-IV.

I will be failing in my duty if I do not record my appreciation and gratitude to late Justice A.C. Gupta of the Supreme Court who despite his heavy Court schedule read the manuscript and made several useful recommendations. So also I am obliged to T.K. Viswanathan, then the Law Secretary of India who took his precious time to go through the manuscript and made valuable suggestions.

I appreciate the hard work put in by Subhash C. Agarwal and Gopal Chandra Das for typing and re-typing the manuscript. And above all to D. Kumar of Shipra Publication to bring out this book of the era gone by but which has not lost its relevance even now.

Needless to say I take full responsibility for any omission and commission.

N.M. Ghatate

Contents

CHAPTER ONE

INTRODUCTION

"In all the three Emergencies there has been an abuse of power, but the Emergency of 1975 takes the cake".

The prime objective of every country whether it is democracy or dictatorship, monarchy or republic, federal or unitary, secular or theocratic is to protect its sovereignty and integrity. To this end, apart from maintaining armed forces and police forces also provides for arming the executive with extra-ordinary powers to meet emergent situation. Proclamations of emergency, state of siege or martial law are some of the prevalent nomenclatures.

India, which has a democratic, federal and republican Constitution, Part VIII of the Constitution contains Emergency provisions. It contemplates three types of emergencies. First, under Article 352, when the security of India is threatened by war, external aggression or armed rebellion. The phrase "by internal disturbance" copying from Section 102 of the Government of India Act of 1935 used in the first Draft Constitution was first replaced by phrase "armed rebellion" but again replaced by "internal disturbance" by the Drafting Committee. It was deleted by the 44th Constitutional Amendment in imposing the Internal Emergency in 1975 because of the abuse of this nebulous phrase. Second, under Article 356 the President's rule is imposed, when the government of the State cannot be carried out in accordance with the provisions of the Constitution, and third, under Article 360 when the financial stability or credit of the country is threatened.

The net consequences of the proclamation issued under any of the three types of Emergencies are that it impairs the federal structure and the Central Government becomes supreme. It also empowers the Central Government to give directions to the States, distribute revenue and legislate for the States. In nutshell the

Central Government can become unitary. However, the independence of judiciary insulated under clause 2 of Articles 125 and 221 cannot be affected either when security of India is threatened or there is a failure of constitutional machinery in the State. During the financial emergency, however salaries and allowances of Judges of the High Court and Supreme Court apart from that of bureaucracy can be adversely affected. Secondly, grave threat or eminent danger cannot be a ground for proclaiming President Rule in States unless there is a break down of constitutional machinery unlike when security of India is threatened there is proclamation of the emergency before actual occurrence if there is an imminent danger thereof.

The Emergency under Article 352 is the most serious of all the three emergencies because firstly under Article 358, Article 19 which forms the bulwark of democracy such as freedom of expression and association, freedom to move throughout the country are suspended and under Article 359, the President is empowered to suspend enforcement of any of the fundamental rights like right to equality, right to life and liberty and fair trial and right to judicial remedies. Secondly Parliament is empowered to make laws in violation of the fundamental rights during the continuance of emergency and the executive power is extended to give direction to any State as to how the executive power should be exercised. Parliament is also empowered to make laws relating to subjects which are reserved for the States—Article 353, the President can also pass orders determining the share of the States regarding duties levied by the executive but collected by the States or allocation of taxes and duties to the States—Article 354. Of course such laws are not permanent but elapses within six months after the withdrawal of Emergency. But before the 44th Constitutional Amendment, the executive was empowered to continue this Emergency as long it wished and there was no time limit for the duration as in Article 356 where democracy in the State has to be restored within three years by holding elections. To top it all the life of Lok Sabha and the State's Legislature can be prolonged for one year at a time vide Articles 83 and 174 during the operation of this Emergency. The Constitution makers vested the executive with these vast powers to preserve the Constitution

and to meet the emergent danger facing the country. But if those who do not have faith in democratic ethos, come to power, temporary "Constitutional Dictatorship" contemplated by the Constitution can degenerate into absolute despotism. History is replete with such instances. In fact this is what happened during the internal Emergency of 1975 declared by the then Prime Minister Indira Gandhi on the ground of 'internal disturbance'. This was the darkest period of Indian democracy. The 44th Constitutional amendment of 1978 by the Janata Government has put fetters so that people could not be denied fundamental rights indefinitely and put the democracy in deep freeze as long as the executive desired.

Since the implementation of the Constitution in 1950, the Emergency was proclaimed three times on the ground of security of India was threatened and each time fundamental right to equality—Article 14, democratic freedoms—Article 19, right to life and liberty—Article 21 and Article 22 which provided for preventive detention were suspended. Furthermore each time powers under preventive detention were abused and the executive continued to prolong emergency long after condition for the issuance of such declaration ceased to exist.

This along with the conditions of detention and the Martial Law, as it also figures under fundamental rights-Article 39 and which finds support in Justice P.N. Bhagwati's majority judgment in *ADM, Jabalpur's case*[1] form the scope of discussion. So also is the Preventive Detention discussed which was the main weapon to detain and silence all opposition during the National Emergency particularly that of 1975. Moreover, the 44th Constitutional Amendment which proposed to check the misuse of emergency provisions and to put on secure footing right to life and liberty is analyzed.

It is therefore, necessary to scrutinize the nature of constitutional power which enables the executive to declare national emergency and its limitations as well as its scope: Also possible remedies to prevent its abuse in the light of our experience with three emergencies, two external and one internal, we have had so far, are examined.

In this context it is worthwhile to mention the conditions formulated by the International Commission of Jurists and Carl J. Fredrich in his book *Constitutional Government and Democracy* are:

(a) the authority that creates the constitutional dictator should be outside the control of the constitutional dictator;
(b) the Emergency should be declared only when the circumstances make it absolutely necessary to do so in the interest of the country;
(c) there shall be a fixed time limit for duration of authorization of power;
(d) the period of Emergency should not be prolonged further than what is absolutely necessary;
(e) the restriction placed on fundamental rights and freedoms should be only such as particular situation demands; and
(f) judicial review by ordinary courts to ensure such dictatorial powers, Emergency legislations and orders are continued to defend the democratic constitution.

To put it briefly, the Emergency powers should be as wide as necessary but their exercise must be strictly controlled.

However, the provisions of the Constitution which pose four more latent threats to democracy are: The President's rule in the States, the Financial Emergency, the Ordinance power, and Presidential discretion. Though important, they do not form the scope of this book and are, therefore, briefly discussed.

Article 356 provides for the imposition of what is generally known as President's Rule in the States which affects the democracy in States and upsets the federal character of the Constitution does not form the part of this work because much has been written about it. However, it may be mentioned when this Article was discussed by the Constituent Assembly many members expressed fears that the party at the Centre would use this Article to subvert federal democracy where different parties would rule in the Centre and the States. Although Dr. Ambedkar in the Constitutional Assembly Debates is on record for stating that this Article would become 'dead letter of the Constitution". The experience has shown that it has been the most abused Article

of the Constitution and has been used more than 100 times in the last six decades. It may be mentioned that the nine Judges Bench of the Supreme Court in *S.R. Bomai's case*[2], realized the inadequacy of parliamentary control of the executive in the abuse of power under Article 356 and unanimously held that satisfaction of the President to take over the administration of a State is justifiable.

The Supreme Court further provided a check on the Central Government that the power to dissolve the State Assembly should be deferred till the Parliament approves the declaration of imposing President's rule. Besides the Court could decide on the validity of the proclamation even after it was approved by the Parliament, and quash it provided it came to the conclusion that it was a malafide or an unconstitutional exercise of power. In that case, *status quo-ante* could be restored reinstating the dismissed Government and the dissolved Assembly. Furthermore, the court could direct the Election Commissioner not to hold fresh elections till (this case adjudicated) the question of dissolution of the Assembly, so that the case does not become infructuous. The Supreme Court in this case also suggested that the floor test was the best method of ascertaining the majority.

However, the finding of the Supreme Court in this very case that the imposition of the President's Rule in the BJP ruled States of Rajasthan, Madhya Pradesh, Himachal Pradesh and Uttar Pradesh after the Babri Masjid demolition in 1992 was justifiable in view of the apprehension of the break down of the constitutional machinery is not correct because the wording of Article 356 require the break down of the constitutional machinery as a pre-condition for imposition of President rule. Secondly, according to the minority judgment a political party which does not believe in basic principles of secularism of the Constitution to it can be dismissed by the Central Government if justified. The minority judgement should have dealt as to what will happen if such government came to power in the Centre as there is no provision for dismissal of Central Government in the Constitution.

Article 360 which provides for financial Emergency also does not form the scope of this study because it has never been proclaimed. It may however, be mentioned that although India has passed through several financial crisis, most acute being the

Foreign Exchange crisis of 1957 and almost financial bankruptcy the country faced in 1991, the country has been able to overcome them without declaring financial emergency. Nevertheless, the executive is armed with this power under Article 360 which may also affect the federal structure of the Constitution as also the independence of the judiciary. For nearly six decades, the country could survive without the exercise of power under Article 360, which nevertheless contains a latent threat to federal as also to democratic structure of the Constitution, as well as the independence of judiciary. It, therefore, seems that emergency powers under Article 360 should be deleted.

The Ordinance making power of the President and the Governors under Articles 123 and 213 respectively also make deep in-roads in the parliamentary system of the Constitution. If the President or Governor, as the case may be, is 'satisfied' that immediate legislation is necessary when the legislature is not in session. The primary law making body being the legislature, the Ordinance has to be laid before the legislature when it assembles and it ceases to operate unless it is approved within six weeks. However, the right of the legislature to critically examine a legislation by referring it to a Select Committee or Joint Parliamentary Committee, becomes a casually. The usual plea of the Government is that any delay would result in the Ordinance lapsing, and there would be a legislative vacuum, and therefore, it would not be possible to refer the Ordinance to a Parliamentary Committee. The frequent use of this extraordinary power has not only eroded legislative power but has resulted in much hasty, ill-conceived and defective legislation. Sometimes, Ordinances are issued just after the session is over to avoid the debate in legislature or just before the session when there could be no pressing urgency. For example, the Bank Nationalization Ordinance was issued by the President late in the afternoon of Saturday, July 19, 1969, that is, after the banking activity closed; and as the Parliament was to meet on Monday, July 21, there could be no conceivable urgency, the Supreme Court in the *Bank Nationalization cases* the eleven Judge Bench of the Court noticed the timing of the Ordinance but as it had become an Act, it did not go into this aspect. But the majority held that the determination by the

President of the existence of circumstances and the necessity to make immediate action, on which the satisfaction was based, was not declared final.[3]

This question of satisfaction, which occurs seven times in the Constitution, particularly in relation to Emergency situations is discussed in the Conclusion.

There are also number of instances when the same Ordinance has been promulgated again and again. In Bihar one Ordinance had been replaced by another as many as seventeen times. It may be mentioned that though the Ordinance has the force of law it is qualitatively different from law enacted by the legislature because as mentioned earlier it is provisional and lapses unless it is approved by the Legislature. The Ordinance therefore, lacks the standard 'procedure established by law' required by Article 21 to deprive a person of his life or liberty. Justice S.C. Gupta noticed this aspect in *A.K. Roy's case*, and his minority view has correctly held that Article 21 is beyond the Ordinance making power.[4]

The Constitutional position of the President and the powers that they flow from it has been the subject of much heated discussions during the Constituent Assembly Debates. Despite judicial pronouncement and constitutional amendments, the position is far from settled. The President has tampered with the federal and democratic fabric of the country and powers and which continues to pose potential danger.

Having adopted the Cabinet system of government with the President at its head, Jawaharlal Nehru and Alladi Krishna Swamy Iyer in the Constituent Assembly Debates stated that the President's position was like that of the British Monarch, who does not have any executive power which rests with the government. This view was contested by K.M. Munshi. If that had been so, there was no need to burden the Constitution with power to impeach him under Article 61 which shows that he has certain discretionary powers. More so, when his office is not hereditary and he is elected by the entire country though indirectly. Not only that he takes oath to 'preserve, protect and defend the Constitution' Article 60 and the Supreme Command of the Defence Forces is vested in him Article 53. While other high Constitutional functionaries take oath to 'Bear true faith and

allegiance to the Constitution' (Article 69). Though the Governor also takes oath like the President vide Article 159, his position is qualitatively different from the President as much as he is not elected and can be removed without any impeachment proceedings. Considering all these aspects, Dr. Ambedkar concluded that the President has certain discretionary powers. Nehru also accepted this view when he said, 'we do not want to make the President just a mere figure head like in the French Constitution'. R.K. Sidhawa pointed out that India had 'bitter experience of the British Governors under the Government of India Act, 1935 in choosing the Prime Minister to suit their own ends and "created hell and mischief in appointing the Prime Minister who lacked the majority support".[5] The Drafting Committee had tabled the Instrument of Instructions for the President in exercise of his discretion; but later it was withdrawn without giving any reasons. This however, underscores the discretionary powers of the President and the Governors.

The Supreme Court had on several occasions considered the scope and powers of the President and the Governors. In relations to "act on this aid and advice of the Council of Ministers under Article 74 (1) and 163 (1) respectively. And it has consistently held that they are under the Constitutional obligation to act on the advice of Council of Ministers as established in *Ramjawaya's case*[6] in 1954 and *Shamsher Singh's case*[8] in 1977.[7] The reason for such interpretation of the un-amended Articles 74 (1) and 163(1) respectively is that India has adopted Cabinet form of democracy and ministers who represent the will of the people and command confidence of the Parliament which consists of people's representatives. This finding in *Ramjawaya's case* was affirmed in *Sanjeev Naidu's case* and *U.N. Rao's case.*[7] The Seven Judges Bench in *Shamsher Singh's case* reiterated this principle. However, Chief Justice A.N. Ray and four other Judges held that the discretionary powers did not vest in the President. In the concurring judgment by Justice Krishna Iyer, however, held that President had certain discretionary powers in choosing the Prime Minister and in the dissolution of Lok Sabha.[8]

Amendments of Articles 74 and 163 by which clause 1 stated that the President and Governor 'shall' act on the advice of the Council of Ministers emphasized his obligation; but the 44th

Constitutional Amendment added clause 2 to these Articles which vested them with one time discretion to the Council of Ministers to reconsider the advice tendered. These amendments, however, do not change the original position of the obligation of the constitutional heads to act on the advice of Council of Ministers which is predicted upon the Council of Ministers enjoying the confidence of the Legislators. But this too is not always so. When the question arises, as to whether one of the Members of the Legislature is disqualified, the question has to be referred to the Election Commission by the President or the Governor as the case may be under Articles 103 and 192 respectively and they have to act on the advice of Election Commission and not of the Council of Ministers. Furthermore, the Governor has the power to refer certain Acts passed by the Legislature to the President under Article 200. Above all there is no time limit within which the Constitutional head has to give his assent to the Bill as passed by the Legislature. For instance, President Zail Singh did not give his assent to Postal Bill nor he return it to the Parliament for reconsideration. This was the first veto of the President uncontemplated by the Constitution. R. Venktaraman, who succeeded him, did return the Bill after a lapse of years, but the Government finally withdrew it.

In 1959, the Parliamentary democracy was rudely shaken when President Neelam Sanjeeva Reddy ignored the claim of Jagjivan Ram to be invited as the Prime Minister though he had the support of 203 of the Members of Lok Sabha and sworn in Charan Singh, who had only 74 Members, as the Prime Minister, dissolved the Lok Sabha and even promulgated draconian preventive detention ordinance *viz.*, Smuggling and Hoarding Ordinance, although 22 out of 24 Chief Ministers had communicated to the President that ordinary laws were sufficient to deal with such problems. And for six months, the Constitutional head had acquired virtual autocratic powers.

With emergence of era of hung legislatures in the Centre and the States, the President and the Governors have acquired arbitrary discretion in appointing Prime Ministers and Chief Ministers who in their opinion can give stable government. But often they are not sure of their opinion and ask them to demonstrate their majority on the floor of the House within a certain period. But

again there is no time limit prescribed so they are not strictly bound to follow the advice of the Prime Minister or the Chief Ministers during this interregnum.

It may be mentioned here that the President when he appoints a Prime Minister who fails to demonstrate his majority, he can legally dismiss the Prime Minister, impose the President's rule and also declare emergency under Article 352, suspend fundamental rights of the people and thwart impeachment proceedings against him by dissolving the Lok Sabha as existence of both the Houses is a pre condition for his impeachment. All this can be done without violating the provisions of the Constitution as pointed out by Allan Glendhill in his book, *The Republic of India, the Development of Law and Constitution.* This however, is no doubt an important subject deserving in-depth study is also excluded from the scope of this work.

Conclusion is given at the end of this work and contains some suggestions for the future.

ENDNOTES

1. *Additional District Magistrate, Jabalpur etc. Vs. Shivkant Shukla etc.* 1976 (2) SCC 521.
2. *S.R. Bomai etc. Vs. Union of India etc.* 1994 (3) SCC 1.
3. *R.C. Cooper Vs. Union of India* 1970 (1) SCC 248.
4. *A.K. Roy etc. Vs. Union of India etc.* 1982 (1) SCC 271.
5. See discussion on Article 74 (Article 61 of the Draft Constitution) *Constituent Assembly Debates*, Vol. VII (New Delhi: Printed by Lok Sabha Secretariate) December 30, 1948, pp. 1141-1161 and Article 163 (Article 142 of the Draft Constitution) Ibid., Vol. IV, June 1, 1949, pp. 489-503
6. *Ram Jawaya Kapoor Vs. State of Punjab* 1955 (2) SCR 225.
7. *Sanjeev Naidu Vs. State of Madras* 1970 (1) SCC 443; *U.N. Rao Vs. Indira Gandhi* 1971(2) SCC 63.
8. *Shamsher Singh Vs. State of Punjab* 1974 (2) SCC 831.