



**EMERGENCY PROVISIONS AND CIVIL LIBERTIES: ANALYZING MOHD.
YAKUB V. JAMMU & KASHMIR AND THE JUDICIAL BALANCING ACT**

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ABSTRACT

The concept of the emergency provisions was formulated during a period of disturbance in India after its independence to protect the nation and the structure of the government while handling governance issues. The landmark case Mohd. Yakub v. Jammu and Kashmir is one such state that best explains the conflict between free individual rights and the state of Emergency in the country. This case was launched during the Indo-Pak war of 1965 When the rules raised questions about appellants' detentions under Defence of India Rules, 1962 and the effects of the President's authority under Article 359I to suspend enforcement of fundamental rights. The Supreme Court held that the Peoples' order made under Article 359(1) is not a "law" that can be challenged under Article 13(2) during an emergency. This decision recalled the Constitution's state of exception regime, delegating the protection of civil liberties to security needs. The judgment also spelt out other measures put in place through amendments such as the 42nd and 44th that respectively expanded and limited emergency powers. The 44th Amendment, for example, changed the criteria as 'internal disturbance' to 'armed rebellion' to declare a national emergency to give even more substantial safeguards against its abuse. The Yakub case, therefore, remains a very significant point of constitutional reference in relation to the question of procedural protection against the arbitrary exercise of power, and the crucial duty that the Indian judiciary has assumed the role of guardians of citizens' rights by 'narrowing down the powers of the executive'. It also puts forward the requirement for openness in using exceptional measures and stresses democratic values. This case reminds the Indian judiciary of a dual function: upholder of the constitution and champion of rights.

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INTRODUCTION

Background of Emergency:

While drafting the Indian Constitution, the country faced significant turmoil and instability. The aftermath of independence included the partition of India into two separate nations, which led to communal riots and issues arising from the integration of princely states. Recognizing the need to safeguard the country from future crises, the framers of the Constitution included provisions for emergencies. These provisions were designed to maintain national security and stability and to ensure effective governance in times of internal and external threats.

The Constitution's emergency provisions are crucial, as they allow for adjustments in governance during severe crises while preserving the country's stability. India's constitutional framework embodies a blend of federal and unitary elements, making it adaptable to situations where federal principles might otherwise compromise national unity.

Types of Emergency:

The Indian Constitution prescribes three Emergencies, namely National Emergency, State Emergency and Financial Emergency.

National Emergency- Art-352¹

The Constitution of India has provided for the imposition of emergency caused by war, external aggression or armed rebellion. This is described as the National Emergency. The President of India can declare this type of emergency if he is satisfied that the situation is very grave and the security of India or any part thereof is threatened or is likely to be threatened either-

- (i) by war or external aggression or
- (ii) by armed rebellion within the country.

The President can issue such a proclamation even on the grounds of threat of war or aggression. According to the 44th Amendment of the Constitution², the President can declare such an emergency only if the Cabinet recommends in writing doing so. This means that the emergency can be declared only on the concurrence of the Cabinet and not merely on the advice of the

¹ *Constitution of India 1950*, art 352.

² *Constitution of India* amended by The Constitution (forty fourth Amendment) Act, 1978.

Prime Minister as was done by Prime Minister Smt. Indira Gandhi in 1975. She had advised the President to proclaim an emergency without consulting her Cabinet.

The proclamation of emergency must be laid before each House of the Parliament, and it shall cease to be in operation at the expiration of one month (prior to the 44th Amendment, it was two months) unless, before the expiry of one month, it has been approved by resolutions of both Houses of Parliament. Such a proclamation of emergency has to be approved by both Houses of Parliament by an absolute majority of the total membership of the Houses as well as 2/3 majority of members present and voting within one month. Otherwise, the proclamation ceases to operate.

In case the Lok Sabha stands dissolved at the time of the proclamation of emergency or is not in session, it must meet the approval of the Rajya Sabha within one month, and after that, it will have to receive the approval of the Lok Sabha also within one month of its session. After the proclamation is ratified by the Parliament the emergency lasts for a period of six months from the time of proclamation. If it is to go beyond the six-month period, there is another prior resolution that has to be passed by the parliament.

Thus, an emergency of this nature carries on without bound. But if the situation becomes favourable, then the emergency can be withdrawn by another proclamation by the President of India. The 44th Amendment of the Constitution states that if 10% or more of the members of the Lok Sabha wish, they can summon a sitting of the Lok Sabha, and that body can disapprove or revoke the emergency by a majority. In such a case, an emergency will immediately become inoperative, which would be totally unfair to the patient's survival.

In the context of the *Mohd Yakub v. State of Jammu and Kashmir*³, it can be clearly seen that it primarily involves the computation of a certain ratio, as has been mentioned above. As in this case, the role of national emergency has become quite significant. The emergency was declared as a result of the Indo-Pak war of 1965, which entailed exercising certain of the called fundamental rights under Article 359(1)⁴. This suspension enabled the government to arrest persons without normal rights, as in the case of *Mohd. Yaqub* under the Defence of India Rules, 1962.

³ *Mohd Yaqub* (n 1).

⁴ *Constitution of India 1950*, art 359(1).

The final appeal of all the issues under consideration in this case came at the Supreme Court level, bringing the conflict concerning the balance between human rights and state security considered in emergencies. The Court further affirmed the permissibility of the President's order to suspend fundamental rights and freedoms, arguing that the same was crucial in managing the exigent situation occasioned by the emergency.

Grounds for National Emergency:

A National Emergency can be proclaimed on grounds of war, external aggression, or armed rebellion. The term "Internal Disturbance," previously used, was criticized for its ambiguity and potential for misuse, as seen during the emergency declared by then-Prime Minister Indira Gandhi in 1975. This emergency, known as the "Black Period," was declared on grounds of internal disturbance, which led to significant controversy and a widespread perception of misuse. Following this, the 44th Amendment replaced "internal disturbance" with "armed rebellion," limiting the scope for declaring an emergency.

In the case of **Indira Gandhi v. Raj Narayan 1975**⁵ the emergency declaration under "internal disturbance" was challenged, leading to significant legal and political repercussions. The Supreme Court ultimately upheld the emergency's validity but highlighted the need for clear safeguards to prevent misuse. As a result, by the 44th Amendment⁶ Act 1978, the phrase Internal Disturbance in Article 352⁷ was removed. So that in future, no Central Government can misuse the power under the Proclamation of Emergency.

In the case of **Bennett Coleman and Co. v. Union of India 1973**,⁸ the Supreme Court ruled that a National Emergency should not invalidate pre-existing laws. The 44th Amendment⁹ aimed to address such concerns by refining the criteria for declaring emergencies. The Constitution itself provides certain safeguards against the abuse of emergency powers by the Executive. First, it is to be exercised on the advice of the Council of Ministers, who are representatives of the people. Secondly, it must be laid before the parliament and cannot remain in force beyond one month without its approval.

⁵ *Indira Gandhi v. Raj Narayan* (1975) 2 SCC 159.

⁶ *Supra* Note 3.

⁷ *Supra* Note 2.

⁸ *Bennett Coleman and Co. v. Union of India* AIR 1973 SC 106.

⁹ *Supra* Note 3.

Effects of Proclamation of Emergency:

1. Extension of Centre's Executive Power (Art-353)¹⁰:-

During an emergency, the central government can direct state administrations on how to exercise their powers. The 42nd Amendment extended this power to cover states outside the emergency zone if national security is threatened.

2. Parliament Empowered to Legislate on State Subjects [Art-353(b)]:- ¹¹

The Union Parliament gains the power to legislate on matters typically under state jurisdiction during an emergency. While state legislatures can still make laws, these are subject to the Union Parliament's overriding authority.

3. Centre Empowered to Alter Distribution of Revenue between the Union and the State (Art-354):- ¹² The President may, during an Emergency be in operation by order after the financial arrangement between the State and the Union as provided in Article-268¹³ - 279¹⁴. Every such order is to be laid before each House of Parliament and will come to an end by the end of the financial year in which the Emergency ends.

4. Extension of Life of Lok Sabha (Art.83 (2)):- ¹⁵

While the Proclamation of Emergency is in operation, the President may extend the life of the Lok Sabha by a year up to a period not exceeding six months after the Emergency ends.

5. Suspension of Fundamental Rights Guaranteed by Art.19:-¹⁶

Article 358¹⁷ allows for the suspension of the six freedoms guaranteed by Article 19 during an emergency. This means that the central and state governments can make laws or take actions that might otherwise infringe on these freedoms.

¹⁰ *Constitution of India 1950*, art 353.

¹¹ *Constitution of India 1950*, art 353(b).

¹² *Constitution of India 1950*, art 354.

¹³ *Constitution of India 1950*, art 268.

¹⁴ *Constitution of India 1950*, art 279.

¹⁵ *Constitution of India 1950*, art 83(2).

¹⁶ *Constitution of India 1950*, art 19.

¹⁷ *Constitution of India 1950*, art 358.

In the case of **M. M. Pathak v/s Union of India 1978**¹⁸ the Supreme Court ruled that while the operation of Articles 14¹⁹ and 19²⁰ can be suspended, their validity is not permanently affected. Once the emergency ends, the suspended rights are restored.

6. Suspension of the Right of Enforcement of Fundamental Rights- Art-359²¹

The President can suspend the right to enforce certain fundamental rights during an emergency. This suspension applies to the whole country or specific parts and excludes Articles 20²² and 21²³, which protect against arbitrary actions.

ANALYSIS

Background of the case:

The Supreme Court of India's decision in *Mohd. Yaqub vs. State of Jammu and Kashmir*²⁴ is a landmark case concerning emergency powers and fundamental rights. Mohd. Yaqub was arrested in November 1966 under Rule 30(1)(b) of the Defence of India Rules, 1962, during a national emergency declared by the President. This detention, along with twenty other similar cases, was challenged through petitions filed under Article 32 of the Indian Constitution, seeking writs of habeas corpus to contest the legality of their detentions.

The central issue was whether the President's order under Article 359(1)²⁵, which suspended the enforcement of certain fundamental rights during the emergency, could be considered a "law" under Article 13(2)²⁶ of the Constitution, and thus be subject to judicial review. The petitioners argued that such an order should be reviewed against the fundamental rights guaranteed in Part III of the Constitution.

The Supreme Court ruled that the President's order was not a "law" under Article 13(2) and, therefore, was not subject to judicial review. The Court upheld the validity of the detention orders, emphasizing that suspending fundamental rights during an emergency was necessary

¹⁸ *M M Pathak v. Union of India* AIR 1978 SC 803.

¹⁹ *Constitution of India 1950*, art 14.

²⁰ *Supra* Note 20.

²¹ *Constitution of India 1950*, art 359.

²² *Constitution of India 1950*, art 20.

²³ *Constitution of India 1950*, art 21.

²⁴ *Supra* Note 1.

²⁵ *Supra* Note 7.

²⁶ *Constitution of India 1950*, art 13(2).

for national security and public order. This case underscores the delicate balance between individual rights and the state's emergency powers.

Constitutionality of Emergency and Amendments:

42nd and 44th Amendments ²⁷ have structured Art. 352²⁸. These changes were due the emergencies, like the National Emergency of 1975.

42nd Amendment Act, 1976

The 42nd Amendment Act of 1976²⁹ represents one of the most major changes to the Indian Constitution. Passed during a national emergency, it introduced, changes across multiple fields. The Preamble was amended to include principles of socialism, secularism, and national integrity. The amendment changed- 40 Articles and the Seventh Schedule, detailing the distribution of powers between the Union and the States, and added 14 new Articles and two new Parts to the Constitution.

The amendment widened the scope of national emergency provisions under Article 352³⁰, which can be declared for the whole country or any part of it and enhanced the period of the president's rule from six months to one year. It also enabled the suspension of fundamental rights during emergencies, with Article 358³¹ changed to allow the suspension of Article 19 rights during an external emergency, thus granting emergency laws immunity from judicial review.

Judicial changes included restricting the High Court's powers of judicial review and proposing an All-India Judicial Service to standardize judicial appointments and administration across the country. These changes were to centralize authority and streamline governance during the emergency period.

44th Amendment Act, 1978

The 44th Amendment Act of 1978³² was introduced to correct the 42nd Amendment and restore democratic principles to the Indian Constitution. The amendment reclassified the right to

²⁷ *Supra* Note 3.

²⁸ *Supra* Note 2.

²⁹ *Constitution of India* amended by The Constitution (forty second Amendment) Act, 1976.

³⁰ *Supra* Note 20.

³¹ *Supra* Note 21.

³² *Supra* Note 3.

property, reducing it from a Fundamental Right to a legal right under Article 300A³³, and removed Articles 19(1)(f)³⁴ and 31³⁵. Article 300A³⁶ ensures property cannot be deprived except by law, and protections for property acquired from minority institutions were added to Article 30(1A)³⁷, requiring fair compensation.

The 44th Amendment also amended presidential powers. Article 74(1)³⁸ was amended to allow the President to ask the Council of Ministers to reconsider their advice, adding a layer of accountability. Due to emergency power misuse, the amendment replaced "internal disturbance" with "armed rebellion"³⁹ as grounds for national emergency and mandated that such proclamations require a written Cabinet recommendation and be reviewed by a special sitting of the Lok Sabha. It retained the automatic suspension of Article 19⁴⁰ rights during war or external aggression⁴¹ emergencies but protected Articles 20⁴² and 21⁴³ rights from suspension. Additionally, Article 257A⁴⁴ was removed, limiting the central government's ability to deploy military forces in states, thus reinforcing federalism and state autonomy.

In the case of **Makhan Singh Tarsikka v. State of Punjab, 1964**⁴⁵ Tarsikka was detained under the Preventive Detention Act of 1950 for allegedly engaging in anti-state activities. He challenged the legality of his detention before the Supreme Court. The key issue in the case was whether the President's Order issued under Article 359⁴⁶ of the Constitution could suspend the fundamental right to habeas corpus. The Supreme Court examined the scope of Article 359⁴⁷ of the Constitution, which allows the President to suspend certain fundamental rights. In both cases, the Court ruled that the suspension of rights must be explicit and clear, and cannot be implied.

³³ *Constitution of India 1950*, art 300 A.

³⁴ *Constitution of India 1950*, art 19(1)(f).

³⁵ *Constitution of India 1950*, art 31.

³⁶ *Supra* Note 38.

³⁷ *Constitution of India 1950*, art 30(1A).

³⁸ *Constitution of India 1950*, art 74(1).

³⁹ *Constitution of India 1950*, art 352 §37, amended by The Constitution (forty Fourth Amendment) Act, 1978.

⁴⁰ *Supra* Note 20.

⁴¹ *Constitution of India 1950*, art 358 §39, amended by The Constitution (forty fourth Amendment) Act, 1979.

⁴² *Supra* Note 26.

⁴³ *Supra* Note 27.

⁴⁴ *Constitution of India 1950*, art 257 A.

⁴⁵ *Makhan Singh Tarsikka v. State of Punjab* AIR 1964 SC 381.

⁴⁶ *Supra* Note 25.

⁴⁷ *Id.*

The detenu was detained under Section 30(1)(b) of the Defence of India Rules, 1962 in the case of **State of Maharashtra v. Prabhakar 1966**⁴⁸. The detention was intended to protect the defence of India and the public from a dangerous man who was capable of causing public disorder. When in jail, Sanzgiri was able to pen down a book on quantum theory and when it was read by the High Court of Bombay they did not find anything wrong with it as it did not pose security risks to the nation. The court said that his detention did not restrict his civil liberties and he was free to carry on his activities within the confines of detention. The two cases depict a constant struggle between the civil liberties of the individuals and state security during an emergency, though while one emphasizes on the right of the detainees the other one is more of a general emergency whereby all civil liberties are suspended.

In the case, **Ram Manohar Lohia v. State of Bihar 1966**⁴⁹ Dr. Lohia was detained under the Defence of India Act, 1962, on the grounds of public safety and maintenance of law and order. He had argued that his detention was illegal and violated his fundamental rights guaranteed under the Indian Constitution. The state claimed that Lohia's speeches and activities were inciting unrest and posing a threat to public peace. In both cases, the individuals were detained under laws specifically designed to address national emergencies or security threats. Both Lohia and Yakub challenged their detentions, arguing that they violated their fundamental rights.

In the case of **Ghulam Sarwar v. Union of India 1967**⁵⁰ Ghulam Sarwar, who was a Pakistani national, was detained under the Foreigners Act of 1946 for being a conspirator of gold smuggling during the national emergency. The Supreme Court affirmed his detention, pointing out the authenticity of the President's order under Article 359(1)⁵¹ which gives the President the power to suspend some of the fundamental rights during an emergency. This case was overruled by Mohd. In Yaqub v. State of Jammu & Kashmir where the SC interpreted the law in Art 13(1)(a)⁵² to exclude a presidential order under Art 359⁵³.

⁴⁸ *State of Maharashtra v. Prabhakar* AIR 1966 SC 724.

⁴⁹ *Ram Manohar Lohia v. State of Bihar* AIR 1966 SC 740.

⁵⁰ *Ghulam Sarwar v. Union of India* AIR 1967 SC 1335.

⁵¹ *Supra* Note 7.

⁵² *Constitution of India 1950*, art 13(1)(a).

⁵³ *Supra* Note 25.

In **ADM Jabalpur v. Shivkant Shukla 1976**⁵⁴ the Court upheld the validity of the President's Order issued under Article 359⁵⁵ of the Constitution, which suspended most fundamental rights, including the right to life and personal liberty. Both cases involve the issue of the suspension of fundamental rights under this provision. In ADM Jabalpur, the Court upheld the suspension of most fundamental rights during the Emergency. It was considered that the President has broad powers during emergencies. In Mohammad Yakub, the Court held that the suspension of fundamental rights must be explicit and clear, and cannot be implied. It emphasized the need for clarity and specificity in the suspension of fundamental rights. These two cases provide different perspectives on the scope of the President's power under Article 359 to suspend fundamental rights.

In the case of **Minerva Mills Ltd. v. Union of India 1980**⁵⁶, a textile company was investigated and an order was passed to take over. The parliament abused the authority given to it under the 39th amendment⁵⁷ placing the president, vice president and prime minister outside the review of Indian courts. The Supreme Court held that the power of the Parliament to amend the Constitution is limited and that Parliament cannot use this power to destroy the Constitution or the fundamental rights of individuals and National Emergency can be challenged in the court on the ground of malafide or that the declaration was based on wholly immaterial and irrelevant facts.

In 1988, in the case of, **S R Bommai v. Union of India 1994**⁵⁸ the Karnataka government led by Chief Minister SR Bommai was dismissed following defections by legislators, using Article 356⁵⁹ to impose the President's Rule. Bommai's attempt to challenge this decision in the courts led to a Supreme Court review. The Supreme Court said that the imposition of the President's Rule under Article 356⁶⁰ must be done cautiously and with reasonable satisfaction of a constitutional breakdown. The Court emphasized that both houses of Parliament must approve the proclamation for it to remain valid beyond two months and that such proclamations are subject to judicial review. The Court found that while Article 356⁶¹ does not expressly address the dissolution of the legislature, this power can be inferred. The Court held that the

⁵⁴ *ADM Jabalpur v. Shivkant Shukla* AIR 1976 SC 1207.

⁵⁵ *Supra* Note 25.

⁵⁶ *Minerva Mills Ltd. v. Union of India* AIR1980 SC1789.

⁵⁷ *Constitution of India* amended by The Constitution (thirty-ninth Amendment) Act, 1976.

⁵⁸ *S R Bommai v. Union of India*, AIR 1994 SC 1918.

⁵⁹ *Supra* Note 62.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

proclamation in Karnataka was unconstitutional, as it did not meet the constitutional requirements of a genuine breakdown in governance.

CONCLUSION AND SUGGESTIONS

The constitutional emergency provisions are the constitutional safeties that the Indian Constitution exercises in order to maintain the integrity and stability of India in crises. The complex nature of these provisions, and their changes with time, demonstrate the nature of the conflict between the security needs of a state and the liberties of its citizens. The provisions for emergencies in the Indian Constitution were an outcome of the issues immediately after the British left India leading to partition, riots and integration of the princely states. In this regard, the drafters' purpose and intent were to provide the needed powers to the government as it pertains to governing and maintaining stability and security within the nation. A National Emergency can be declared on grounds of war, external aggression or armed rebellion. Examples include emergencies that have occurred in the past including 1962, 1971, and 1975 where the provision has been used consequences. The 44th Amendment Act⁶² substantially changed emergency provisions as it restricted the area of the misuse of this phenomenon and enlarged the intervention of the parliament. Substituting the "internal disturbance" with "armed rebellion" as well as the need for a Cabinet recommendation are also significant advancements in the protection of procedural safeguards.

Cases like *Mohd. Yaqub vs. the State of Jammu and Kashmir*⁶³ highlights a number of issues in relation to conflicting human rights in relation to the rights of the state. The judgements passed by the Supreme Court uphold the fact that as much as the regimes require emergency powers, those must be exercised provided that they will not violate the Constitution. The 42nd Amendment⁶⁴ broadened emergency powers but faced criticism for its potential for abuse. The 44th Amendment⁶⁵ responded by restoring democratic norms, curtailing excessive powers, and reinforcing checks and balances. This includes ensuring that fundamental rights under Articles 20⁶⁶ and 21⁶⁷ remain inviolable and refining the process for extending emergency declarations. While the 44th Amendment⁶⁸ introduced necessary safeguards, continuous vigilance is

⁶² *Supra* Note 3.

⁶³ *Supra* Note 1.

⁶⁴ *Supra* Note 34.

⁶⁵ *Supra* Note 4.

⁶⁶ *Supra* Note 26.

⁶⁷ *Supra* Note 27.

⁶⁸ *Supra* Note 4.

essential. Parliamentary committees should regularly review the application of emergency provisions to ensure they are used appropriately and not for political gains. The process for declaring and extending emergencies should be accompanied by detailed documentation and public disclosure. This transparency will help in maintaining public trust and ensuring that emergency powers are not misused.

The formal changes in relations and power rationalizations, the shifts in clients' expectations, and the appearance of new challenges require constant check-ups and updates in legal provisions for emergency situations and their judicial interpretations. Discussing prior and current world legal systems, civil society, and political leadership shed light on insights in reform. The presence of information regarding the extent and the boundaries of emergency powers may allow the members of the society to be informed about their rights and constitutional safeguards that are in place when emergencies are declared. Educational initiatives can help clarify the emergency provisions and their implications for everyday governance. Considering the fact that India has a federal structure, special care should be taken so as not to compromise state sovereignty in its implementation. Provisions to check the dominance of centralization with state powers must be exercised especially in the course of the State Emergency.

CASE COMMENT

In the leading case of *Mohd. Yakub v. State of Jammu and Kashmir*⁶⁹, I fully support the Supreme Court's decision where it affirmed the constitutional authority of the President's order under Article 359(1)⁷⁰ during the time of emergency proclamation. The order is not for the enacted enactment, and the Court was right to hold that such an order is not a "law" within Article 13(2)⁷¹ and, therefore, cannot be the subject of Part III of the Constitution. This judgment reminds the executive branch about the need to protect the sovereignty and independence of the state and public order during an emergency, which gives the executive a guarantee of power to act as it wishes. The Court was successful in achieving the best of both worlds, respecting the rights of individuals and, at the same time, acknowledging the status and emergency provisions that afford security to the collective whole, thus strengthening the constitution of India.

⁶⁹ *Supra* Note 1.

⁷⁰ *Supra* Note 7.

⁷¹ *Supra* Note 30.

The Court's interpretation of the emergency provisions infers the need for a strong and viable government to deal with exceptional circumstances and not to be rigid by procedures. This decision also gives direction to future cases and, at the same time, argues that the judiciary cannot proceed without bearing in mind the impact that its decisions will have on national security and public order within the provisions of the constitution. Through the implementation of the President's order, the Supreme Court has shown its loyalty towards the preservation of this nation's stability and harmony besides ensuring that the executive branch uses its powers as mandated by the constitution. This maintains some freedoms of the individuals while at the same time strengthening the country's immunity to such adversities.

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