

Derogation of Human Rights in Indian Constitution: A Study on Indian Society

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ABSTRACT

Human rights are sacrosanct and fundamental to the very existence of the human being in the world. Human beings cannot be deprived of any human rights on any ground as they are vital for right to life with dignity. So, human rights are inalienable in nature. Although few Rights are subject to “reasonable restrictions” imposed by rules & regulations on grounds, such as, public order and peace and national security. So, they are denied when security of a nation is put at risk, particularly, in situations of emergencies or Civil Martial Law. The ICCPR has also allowed derogation of human rights, in some exceptional cases. The Constitution of India also similarly authorized the Centre government to suspend these Rights for the duration of the promulgation of emergencies. However, after 44th Amendment to the Indian Constitution, Article 20 and Article 21, that is, Right to life is kept out of preview of restrictions. In light of recent development like farmers protest in north India and crime against Dalits and Activist, the present paper deals with the effect of Indian Constitution on Indian Society. As the thread of unity is very sacred to the foundation of very diverse Indian society for its stability and peace, so, it is important to curb the sense of insecurity in the people of the country.

KEY WORDS: Rule of Law, Emergency, Civil and Political Rights, Covenant, Constitution, Derogation, Human Rights, Under-trials, Dalit, Freedom of Expression, Refugee, Activist, Capital Punishment, Extra-judicial Killing.

INTRODUCTION

Human rights are very fundamental and inalienable to the existence of the human being. Human beings cannot be deprived of any human rights on any ground as they are vital for right to life

with dignity. Although few rights are subject to “reasonable restrictions” imposed by rule & regulation of the country on grounds, such as, public order and peace and national security. So, they are denied when security of a nation is put at risk, particularly, in situations of emergencies or Civil Martial Laws. The ICCPR (International Covenant on Civil and Political Rights) has also allowed the derogation of human rights, in some exceptional cases. Since India is a signatory to the ICCPR, therefore, the derogation of human rights is also allowed in the India’s constitution. Although the ICCPR has also mentioned the conditions in which the ICCPR does not allow derogation from the human rights, but the Constitutions of India¹ lacks the complete elaboration of the safety measures. As it is evident from the situation during the emergency of the 1975, where the Right to life, which is core of the human existence is abused several times. So, the “right to life” was first could be derogated in emergencies and Civil Martial Law, but, after bitter experiences of its abuse during the 1975’s emergency, the parliament of the India through the 44th Amendment to Indian Constitution take away the powers of complete suspension of fundamental rights from the control of the central government. Therefore, now complete suspension of the Fundamental rights is not allowed in any circumstances.

As Indian society is known for its diversity, so, even the small insecurity among the people of the country can lead to the split of the unity thread of Indian society. It may result into chaos and it hampers the peace and harmony of Indian society. So, the government of the country should balance the individual’s rights as well as the group’s rights under the umbrella of the Indian Constitution.

DEROGATION

Derogation means after the giving consent to the treaty, then during the instance of ratification of that treaty the State can claim exemption from the particular clause of the treaty. So, in that situation the liability imposed by human rights treaties can be overlook by the state on the requirements of maintaining law and order. However, it cannot be claimed indiscriminately and should be restricted by necessity of the circumstances. So, according to the ICCPR, ‘the human rights can be derogated only in accordance with the situations allowed under a treaty, such as, proof of a state of emergency, evidence received by depository authorities of a treaty. Moreover, derogation must stay active only till the emergency in place. But there are a few human rights, which are non-derogable even in a circumstances of public emergencies. Those human rights, which declared non-derogable under the Covenant, such as, “right to life”, prohibition of torture, freedom of conscious, religion and thought and right to fair trial.’

Therefore, ICCPR does permit the derogation from the obligation of the treaty to observe human rights in the interval of public emergencies in place. As Para 1 of Article 4 of the Covenant states that, “in time of public emergency, which jeopardize life of a nation, the State Parties may derogate from their obligations under it. But the provision does not mean that the State shall have complete freedom to abuse other provisions of the Covenant. Nonetheless, there also safeguards against the abuse are provided in time of emergency laid down under Article 4 of the Covenant like public emergency threatening life of a nation must be officially declared and must not be discriminatory.”²

A wide-ranging interpretative attempt has been prepared in the Siracusa Principles, regarding the derogation rules provided in the ICCPR. The ‘Siracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights’ are outcome of a meeting of eminent international scholars from various Countries and international human rights organizations, who met at Siracusa, Italy, in 1984. An unanimity has been made to scrutinize the permissible limitations and justification for derogations tolerable under the ICCPR. It was settled that there is a relationship between the guarantee of human rights and safeguarding of international and national’s law & order, peace and security. Later, these Siracusa Principles were adopted by the United Nations. The Siracusa Principles laid down that ‘the scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant’ and that ‘all limitation clauses shall be interpreted strictly and in favor of the rights at issue. Siracusa Principles protects right to life as a non- derogable one, saying that ‘no State, including those that are not parties to the Covenant, may suspend or violate, even in times of public emergency’.

SUSPENSION OF HUMAN RIGHTS DURING EMERGENCY AND CIVIL MARTIAL LAW IN INDIA

The emergency provisions are contained in Part XVIII of the Constitution of India, from Article 352 to 360. These provisions enable the Central government to meet any abnormal situation effectively. The rationality behind the incorporation is to safeguard the sovereignty, unity, integrity and security of the country, the democratic political system and the Constitution.

Emergency in India proclaimed first time in 1962 after independence. In 1971, it was proclaimed again due to war with Pakistan. Further, it was also declared on June 26, 1975, when the security was threatened due to internal disturbance. The emergency proclaimed in

1975 continued up to March 1977. There are two modes of suspension of fundamental rights in the Indian Constitution. One is that few fundamental rights are suspended automatically with the proclamation of an emergency by the President, and other fundamental rights of Part II can be suspended by a specific Order of the President after the proclamation of the emergency. The President has discretion to suspend all or few fundamental rights by an Order.

Articles 358 and 359 of the Indian Constitution describe the effect of a National Emergency on the Fundamental Rights. These two provisions are explained below:

- According to Article 358, when a proclamation of National Emergency is made, the six fundamental rights under article 19 are automatically suspended. Article 19 is automatically revived after the expiry of the emergency. The 44th Amendment Act laid out that Article 19 can only be suspended when the National Emergency is laid on the grounds of war or external aggression and not in the case of armed rebellion.
- Under Article 359, the President is authorised to suspend, by order, the right to move any court for the enforcement of Fundamental Rights during a National Emergency. Thus, remedial measures are suspended and not the Fundamental Rights. The suspension of enforcement relates to only those Fundamental Rights that are specified in the Presidential Order.

The suspension could be for the period during the operation of emergency or for a shorter period. The Order should be laid before each House of Parliament for approval. The 44th Amendment Act mandates that the President cannot suspend the right to move the court for the enforcement of Fundamental Rights guaranteed by Article 20 and 21.

Enforcement of right to life by a Presidential Order would not be suspended during the proclaimed emergency. The change was made to prevent the repetition of the situation, which arose in A.D.M. Jabalpur case³, making it consistent with Article 6(1) of the Covenant, which stipulated for the prohibition against arbitrary deprivation of the inherent right to life in times of emergency. Secondly, the amendment added a new clause in Article 359, which provided that the suspension of the enforcement of any right under Article 359 would not apply in relation to the proclamation of emergency in operation, when it would be made or to any executive action taken otherwise than under a law containing such a recital. Therefore, laws unconnected with emergency could be challenged in a Court of Law, even during emergency.

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The Supreme Court in *Union of India V. Bhanudas*⁴ ruled that the Presidential Orders suspending enforcement of fundamental rights impose blanket bans on any and every judicial enquiry and investigation into the validity of an order depriving a person of his personal liberty and that the Court was debarred from even granting relief in the shape of giving facilities to a detune to be taken from his place of detention to his home or to an examination hall or for special medical treatment under a doctor of his choice or for any other facility because that would be enforcing fundamental right through the aid of the Court.

The consequence of these two disastrous judgments was that the writ of habeas corpus was in substance suspended and the Rule of Law was supplanted. Arbitrary detentions increased, conditions and treatment of detunes in jail worsened and the executive in many cases became a law unto itself.

Martial Law shows that the relevant constitutional law has been one of the highly controversial issues in India. Due to grave implication of the law, it led to a number of constitutional amendments (The Constitution Act, 1975; The Constitution Act, 1976; The Constitution Act, 1978). The President of India is authorized to proclaim emergency. Bypassing the Thirty-Eighth Amendment Act 1975, Article 32 was amended, which enabled the President to issue different proclamations on different grounds even a proclamation was already issued. On June 26, 1975, the President issued a further proclamation, on the ground of 'internal disturbance', though a proclamation on the external aggression was already in force since 1971.

The satisfaction of the President was made final and conclusive by 38th Amendment Act 1975. The 38th Amendment Act of 1975 made the declaration of National Emergency immune to judicial review. But, this provision was subsequently deleted by the 44th Amendment Act of 1978. In *Minerva Mills's case*⁵ (1980), the Supreme Court held that National Emergency can be challenged in the court on the ground of malafide or that the declaration was based on wholly extraneous and irrelevant facts. Although the withdrawal of the proclamation of emergency was a political question, but if it was prolonged for long and malafide in nature, then the Supreme Court could review it.

CITIZENSHIP (AMENDMENT) ACT

The protection of religious minorities in India has been called into question a number of times. This includes when Indian Parliament passed the Citizenship (Amendment) Act (CAA) in Dec, 2019.

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The act provides fast track citizenship for certain religious minorities from Afghanistan, Bangladesh and Pakistan who entered India prior to 2015. Minorities include Hindus, Sikhs, Buddhists, Jains, Parsis and Christians. However, the act does not extend to Muslim minorities. Concerns about the act were raised internationally. The United Nations Human Rights office described the act as “fundamentally discriminatory in nature”. The United States Commission on International Religious Freedom also said it was “deeply troubled” by the act.

The passage of the act led to large-scale protests across India. This saw violent clashes between the police and protesters, with many being injured.⁶ As the CAA led to emergence of sense of insecurity in the minority people staying in Indian society.

In June 2018, the UN High Commissioner for Human Rights called on India to immediately release human rights defenders who had been arrested for protesting against the CAA. However, the majority remained in detention at the end of the year.

JAMMU AND KASHMIR ISSUE

In August 2019, the Indian Government revoked article 370 of the Indian Constitution. This removed constitutional autonomy from the state of Jammu and Kashmir, a predominantly Muslim region. Article 370 had several functions, including providing the state with autonomy over its own constitution and freedoms to make laws.

The removal of article 370 led to unrest in Jammu and Kashmir. This saw Indian troops deployed, phone and internet services shut down, and certain politicians and public figures arrested which is an alleged human rights violation in Kashmir.⁷

VIOLENCE AGAINST THE DALIT COMMUNITY

Incidences of violence against the Dalit community have been reported in India for several years. In 2020, protests commenced following the gang rape and subsequent death of a 19 year-old woman in the state of Uttar Pradesh. This was one of several violent incidents reported to have taken place against members of the Dalit community.

Dalits are described as being the “lowest rung” of India’s Hindu caste system.⁸ The caste system is one of the world’s oldest forms of social stratification.⁹ It divided Hindus into rigid hierarchical groups based on their work and religion.

OTHER INCIDENTS AGAINST RELIGIOUS MINORITIES

Hate crimes against Christians in India are reported to have risen in 2020. Several charities have argued that state cooperation with extremists is a key cause of the problem.

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The Christian advocacy group Open Doors published a report in June 2021 on the issue and highlight that the daily life for many Christian and Muslim communities in urban and rural India has become an excruciating struggle to earn a living and practice their faith, while also remaining alive and under the radar of the far-right Hindutva organizations that now dominate the Indian public and political sphere.

FARMERS' PROTESTS AND AGRICULTURAL REFORM

In September 2020, the Parliament of India has passed three agricultural reform laws. Laws would have amend the rules regarding the storage, pricing, processing and sale of agriculture produce. These laws were met with widespread criticism from farmer and farmers' unions.

“This led to several months of widespread protests in India where it is reported that more than 400 protestors died. In addition, the protests also saw the arrest of several journalists who were covering the protests. Human Rights Watch called on Indian authorities to drop what they described as “baseless charges” against journalists.”¹⁰ Ms. Meenakshi Ganguly, the South Asia Director of Human Rights Watch, said that “the Indian authorities’ response to protests had focused on discrediting peaceful protesters, harassing critics of the government, and prosecuting those reporting on the events”.

The three agricultural reform laws were then suspended subsequent by the ruling of the honorable Indian Supreme Court in Jan, 2021. Thereafter, these three laws are repealed by the center government of India.

ARBITRARY ARRESTS AND DETENTIONS

The Seven human rights activists – Hany Babu, Father Stan Swamy, Anand Teltumbde, Jyoti Raghoba Jagtap, Sagar Tatyaram Gorkhe, Gautam Navlakha and Ramesh Murlidhar Gaichor were arrested by the central government’s counter-terrorism agency, that is, National Investigation Agency (NIA) for their suspected connection in violence during the Bhima Koregaon celebrations in 2018 near the city of Pune. These seven activist worked with downtrodden and marginalized groups, including Adivasi (Indigenous) communities. They had criticized government policies on ground like discrimination and biasedness. The government accused them of breaching the Penal Code by “waging war against the country”.

CONCLUSION

Indian Constitution has the emergency provision which suspend the human rights during its proclamation under the guise of the law and order. But still there are some human rights, which are non-derogable even in a circumstances of public emergencies. The human rights, which are

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declared non-derogable under the ICCPR, are “right to life”, prohibition of torture, freedom of conscious, religion and thought and right to fair trial. ‘But still substantial human rights issues including unlawful or arbitrary killings, including extrajudicial killings by the government or its agents, forced disappearance by the government or its agents, arbitrary arrests of journalists and human rights activists, censorship, site blocking, substantial interference with the rights of peaceful assembly and freedom of association, capital punishment, criminal violence against women and girls and lack of investigation are rampant in the country.’

As Indian society is known for its diversity, so, even the small insecurity among the people of the country can lead to the split of the unity thread of Indian society. It may result into chaos and it hampers the peace and harmony of Indian society. So, the government of the country should balance the individual’s rights as well as the group’s rights under the umbrella of the Indian Constitution. Therefore, government of India has taken up some steps like 44th Amendment to the Indian Constitution and judicial review of emergency proclamation. But still mills to go before we achieve universal application of human rights in true sense, while balancing the national security and individual’s rights.

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