

Derogation of Human Rights under the Covenant and their Suspension during Emergency and Civil Martial Law, in India and Pakistan

Aman Ullah

University of the Punjab, Lahore

Samee Uzair

University of the Punjab, Lahore

ABSTRACT

Human rights are so fundamental and inalienable that they can-not be denied to any human being on any ground. Moreover, they are always available to everyone at all times. Few are available to citizens only, and few are subject to reasonable restrictions imposed by law. In addition, they are not available when life of a nation is jeopardized, particularly, in exceptional circumstances of an emergency or Civil Martial Law. The International Covenant on Civil and Political Rights 1966 as well provides human rights both in normal and abnormal situations of a State. It permits to derogate their availability. Not only the Covenant permitted derogation of human rights, in exceptional cases but the Constitutions of India and Pakistan also authorized the governments to suspend them, during the promulgation of emergencies. However, right to life was saved from the clutches of a Government, during a constitutional emergency, after 44th Amendment in the Indian Constitution. Similarly, its protection, under Article 4 of the Constitution of Pakistan 1973, compelled the Government to keep its hands off to suspend it during the promulgation of an emergency. Now, both in the Constitutions of India and Pakistan, it is immunized from suspension, during an emergency or Civil Martial Law, nevertheless, the protection is by two different legal schemes.

KEY WORDS: Civil and Political Rights, Covenant, Constitution, Derogation, India, Pakistan.

Introduction

At the outset, the research explains characteristics of human rights as they are so fundamental and inalienable that they can-not be denied to any human being on any ground. Moreover, they are always available to everyone at all times. Few are available to citizens only, and few are subject to reasonable restrictions imposed

South Asian Studies 26 (1)

by law. In addition, they are not available when life of a nation is jeopardized, particularly, in exceptional circumstances of an emergency or Civil Martial Law. The International Covenant on Civil and Political Rights 1966 as well provides human rights both in normal and abnormal situations of a State. Then, the paper highlights the grounds on which it permits to derogate their availability. Since India and Pakistan are both its signatories, therefore, the derogation of human rights, particularly, right to life in their Constitutions is elaborated in detail. It also focuses on what are the circumstances in which the Covenant does not allow derogation, but the Constitutions of India and Pakistan do. Finally, it examines that how right to life was first could be derogated in emergencies and Civil Martial Law, but, after bitter experiences of its abuse, India amended the Constitution, taking away the powers of suspension from the hands of the government. Similarly, in Pakistan, how the right is otherwise available, during constitutional emergencies has been compared.

Derogation

Besides reservations, understandings or declarations at the time of ratification of a treaty, the member States are allowed to derogate from international human rights obligations, due to various reasons, including maintaining the writ of a government. In the case of derogation, a State claims exemption from the liability, imposed by a human rights treaty. Mostly, it is claimed, in a situation, where a State needs to maintain law and order. It does apply to more than one human right (Doebbler, 2004: 287).

However, it cannot be claimed arbitrarily. Human rights can be derogated only in accordance with the circumstances allowed under a treaty. The enabling conditions are:

- 1) proof of a state of emergency
- 2) derogation must be limited by necessity of the situation
- 3) Information received by depository authorities of a treaty
- 4) It must be limited till the emergency (Ibid).

There are a few human rights, which cannot be derogated, even in a situation of public emergency, and the distinction is made by the relevant human rights treaty itself, with an exception of ACHR. The human rights, which are expressly declared non-derogable under the Covenant includes prohibition of torture, right to life, freedom of conscious, religion and thought 'under any conditions even for the asserted purpose of preserving life of a nation' (The Siracusa Principles, n.d.: art. 58). According to some treaties, right to fair trial is also non-derogable.

It is pertinent to point out that the derogable human rights in one treaty differ with another human rights treaty. There is no consensus on all derogable and non-derogable human rights, due to various reasons. Particularly, the difference is noteworthy between the ICCPR and the ACHR.

Emergency Provisions under the Covenant

The Covenant does allow the derogation from the obligation to observe human rights, arising in the time of public emergency. It is to be noted that the Covenant expressly lays down the provisions as to emergency. Para 1 of Article 4 of the Covenant envisages that, in time of public emergency, which threatens the life of a nation, and the existence of which is officially proclaimed, the State Parties may take measures, derogating 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, the safeguards against the abuse are provided in time of emergency, by two ways.

Firstly, there cannot be any derogation in respect of certain human rights (Ibid: r. 4), even in the time of emergency. Right to life is one of the Human Rights, which cannot be held in abeyance, even in the officially declared State of emergency (Ibid: r. 6). Secondly, there are certain rights, which may be suspended, but certain minimum safeguards have to be provided as stipulated in the Covenant. Safeguards are laid down under Article 4 of the Covenant like public emergency, threatening life of a nation: they must be officially declared, must not be discriminatory, and must immediately inform the other State Parties.

A comprehensive interpretative effort has been made in the Siracusa Principles, regarding the derogation rules provided in the ICCPR (Op. cit., 2004: 287). The ‘Siracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights’ was an endeavor of a group of international experts from various States and international human rights organizations, who met at Siracusa, Italy, in 1984. Among the delegates a consensus developed to examine the conditions and justifications for permissible limitations and derogations, allowed by the Covenant. Purpose of the attempt was to maintain rule of law effectively. In the Principles, the legitimate objectives, the general principles of interpretations, and grounds for limitations and derogations were underscored. It was also agreed that there was a great deal of relationship and influence between respect for human rights and maintenance of national order and international peace and security (Lawson & Bertucci, 1996: 256). Later, they were adopted by the United Nations.

Among other rules of interpretation of the Limitation and Derogation provided in the Covenant, 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.’ While elaborating the issue of limitation and derogation, it further set out that ‘all limitations shall be interpreted in the light and context of the particular right concerned’ and that ‘all limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant’ (Op. cit., n.d.: r. 3-4). As mentioned already, the Covenant permits derogation of human rights in a case of public emergency, particularly, when life

South Asian Studies 26 (1)

of a nation is jeopardized. However, like the Covenant, Siracusa Principles also 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' (Ibid: r. 69). The Human Rights Committee, regarding the Report about public emergency in Iran and Lebanon, also stressed' that the Covenant was designed to apply both in normal and abnormal times, and that under Article 4 as well Article 40(2) of the Covenant contained appropriate provisions concerning particular situation' (McCarthy, 1998: 217).

In 2001, the Human Rights Committee has re-asserted the significance of human rights protection and elaborated the rules on limitation and derogation, in the case of public emergency, provided under the Covenant (Human Rights Committee, n.d.).

Suspension of Human Rights during Emergency and Civil Martial Law in India

Emergency was first time proclaimed in 1962¹. 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. In the Indian Constitution, no express provision has been made for any of the above safeguards mentioned in the Covenant. On the contrary, in times of emergency, there was a provision for the absolute suspension of fundamental rights provided under Article 19 and also the enforcement of other rights conferred by Part III of the Constitution by a simple declaratory order to that effect by the President (Constitution of India, 1950: art. 358-359). However, the Forty-Fourth Amendment Act 1978 has substantially changed the position by amending Articles 358 and 359.

Firstly, the Act enjoins that the enforcement of right to life by a Presidential Order would not be suspended, during the proclaimed emergency, incapacitating the Executive. The change was made to prevent the repetition of the situation, which arose in *A.D.M. Jabalpur* (*A.D.M. Jabalpur v. S. Shukoa*, 1976: 1207), 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.

It is significant to note that the Forty Fourth Amendment Act has considerably changed the position as to the suspension of fundamental rights and their enforcement during the emergency. Although the changes were made to prevent the abuse of fundamental rights of the people by the executive, these changes have also made the provisions of the Constitution consistent with the provisions of the Covenant. Now, whenever emergency will be proclaimed in India, it is bound to abide by the measures contained in Article 4 of the Covenant, which needs to be followed, because of its international obligations, arising from the ratification of the Covenant. Similarly, another amendment in Article 352(1) excluded the ground of 'internal disturbance' as a reason to proclaim emergency by the President of India. However, the ground of internal disturbance was substituted with ground of 'armed rebellion'. It is pertinent to mention here that fundamental rights are negatively affected when emergency is proclaimed by the President of India or when army is called to control violence or riots under different provisions of the Constitution. The later is as well called as a Civil Martial law. It is necessary to distinguish them as the legal effects of both emergencies are different with each other.

It is, however, not necessary that once Civil Martial law becomes effective, the working of the Courts are not automatically suspended. It is for the military authorities to decide whether military tribunals are to be set up or not and whether Civil Courts will cease to function or not. During the Civil Martial Law, the executive calls the military to its aid and the military, acting under the general authority of the executive, proceeds to quell violence. However, when it is over, then to protect the actions taken during the Civil Martial Law, an Act of indemnity may be passed to validate the wrongs done during that period, but no such act done after the emergency (Ibid: art. 34). It is evident that, when curfew is imposed, shoot at sight orders are issued; all courts and offices are virtually closed; military is called to help in restoring and maintaining the public order. It is akin to Martial law, even no proclamation of emergency is issued by the President of India. Apart from the provision of proclamation of emergency and declaration of the Civil Martial Law, under the Indian Constitution, in which fundamental rights are suspended or taken away, they are not ordinarily available to the people of the Discipline Forces, during service. Since they have their own quasi-judicial system of justice, therefore, the Constitution precludes the jurisdiction of the Constitutional Courts (Ibid: art. 33).

Neither the Covenant covers the above provisions of the Indian Constitution, nor do the reservations in the Instrument of Accession. Moreover, the laws providing for acquisition of States are put in the Ninth Schedule of the Constitution, precluding them from the remedial regime of fundamental rights, even without an emergency. They too contravene the Covenant (Ibid: art. 31B). The constitutional history of Proclamation of Emergency and imposition of Civil

South Asian Studies 26 (1)

Martial Law show 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. If he is satisfied that a grave emergency exists where by the security of India or its any part has been threatened either by war or by an external aggression or by internal disturbance, he may, by a proclamation, make a declaration to that effect, even in the case of their imminent danger. By passing 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, conclusive and non-assailable in any court by 38th Amendment Act 1976. However, the 44th Amendment Act, 1978 repealed the immunity. In the leading case of *Minerva Mills* (*Minerva Mills v. Union of India*, 1980: 806), the Supreme Court of India held that it could review the justification of the proclamation of emergency, and there was no bar to judicial review of the validity of the proclamation of emergency issued by the President of India. Although the withdrawal of the proclamation of emergency was a political question, but if it was prolonged and *mala fide*, then the Supreme Court could review it.

Suspension of Human Rights, during Emergency and Civil Martial Law in Pakistan

Justice Munir, in his commentary on the Constitution of Islamic Republic of Pakistan 1973 extra-cordially opined that a proclamation of emergency was a disastrous action, but unavoidable step to be taken only because of the perilous condition in which the country found itself by reason of actual or threatened war or external aggression or internal disturbance, so intense and wide spread that provincial governments found themselves unable to control them. Therefore, during the emergency, he observed, the country practically came under a unitary form of government (Munir, 1976: 511). Although the provisions of proclamation of emergency, both in Indian and Pakistan's Constitutions, are akin to each other, with few fundamental differences which are noteworthy. Unlike the Indian Constitution, after a Constitutional amendment, the Constitution of Pakistan 1973 recognizes the ground of 'internal disturbance, as a constitutional justification for the proclamation of emergency and suspension of human rights, including right to life (Constitution of Pakistan, 1973: art. 232 (1)). Similar to India, fundamental rights are suspended by two ways. The suspension of few fundamental rights is auto- triggered with the declaration of proclamation of emergency, and the suspension of other fundamental rights, provided in Chapter 1, Part II of the

Constitution, needs a special Order by the President after the proclamation of emergency.

In the Indian Constitution, only fundamental rights and freedoms, provided under Article 19, are suspended with declaration of proclamation of emergency, but not right to life. On the contrary, in Pakistan, there are many fundamental rights, the suspension of which is attached with the proclamation of emergency, including right to life. Those fundamental rights are freedom of movement (Ibid: art. 15), freedom of assembly (Ibid: 16), freedom of association (Ibid: art. 17), freedom of trade, business and profession (Ibid: 18), freedom of speech (19), and protection of property rights (Ibid: art. 24). The Pakistan Constitution enumerates the fundamental rights, which are suspended with the proclamation of emergency and do not require a separate Presidential Order namely Articles 15, 16, 17, 18, 19, and 24, but they resurrects after the emergency is ceased. Moreover, the laws inconsistent with them, during emergency, would also cease immediately (Ibid: art. 233 (1)). Although right to life, under Article 9, may be suspended, during the promulgation of emergency, but it remains available due to Article 4(2), inserted in the Chapter of Fundamental Rights, containing similar provisions like Article 9 of the Constitution. Another major difference with the Indian Constitution is that the Indians, after bitter experience of emergencies during the 70's, curtailed the grounds of emergency by substituting the ground of internal disturbance with the ground of 'armed rebellion.'

On the other hand, Pakistan enumerated new grounds of emergency in the Constitution, which have been abused more than the other grounds with reference to human rights. The new ground of proclamation of emergency is that the President can proclaim an emergency, when he is satisfied that the provincial government is not being carried on in accordance with the provisions of the Constitution (Ibid: art. 234 (1)). However, there is no bar on the jurisdiction relating to the powers of a High Court, prohibiting the suspending authority of the judicial power, which extends to the whole Constitution of Pakistan (Ibid). The Proclamation Order cannot be challenged in any Court of Pakistan; however, these provisions have been taken away from the Indian Constitution by a constitutional amendment. The Pakistan Constitution, while protecting the Order, says that 'the validity of any Proclamation issued or Order made under this Part shall not be called in question in any court (Ibid: art. 236 (2)). Due to judicial activism, apart from these provisions, the Supreme Court of Pakistan, in a recent case on the validity of Proclamation Order, held that judiciary had right to review it under the powers of judicial review. Therefore, the proclamation of the emergency was validated, but the suspension of the fundamental rights was declared unjustified (Farooq Ahmad Leghari v. Federation of Pakistan, 1999: 57).

Contrary to the Indian constitutional provisions of Article 34, which uses the name of Martial law, the Constitution of Pakistan does not use these words, but provide a same kind of protection provided in the Indian Constitution (Constitution of Pakistan, 1973: 237). Delegating the powers of judicial review,

South Asian Studies 26 (1)

now, by an Order of the Lahore High Court Administrative Committee, the power to issue writ of Habeas Corpus is also available to the Sessions Judges, in charge of Sessions Divisions of Islamabad and the Punjab (Dawn, 2002). As long as the Civil Martial Law is concerned, the Indian Constitution makes the duty of the Union to provide protection to the States in case of external aggression and internal disturbance (Constitution of India, 1950: 355). However, it does not mention the calling of Armed Forces in the aid of civil authority, but if they are called through other provisions of the Constitution, then it protects them under Article 34. On the other hand, Pakistan Constitution expressly mentions the role of Armed Forces, if called for the purpose to maintain law and order (Constitution of Pakistan, 1973: 245).

Although the word Civil Martial law has not been used in Article 245 intentionally, but its exercise is almost of the same nature of Civil Martial law. The language of Article 245 (3) does not spell out a naked ouster of jurisdiction of the High-Courts under Article 199 of the Constitution.¹

Note

1. In 1962, emergency was proclaimed, when China attacked India. It continued up to January 10, 1968.

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Biographical Notes

Dr. Aman Ullah is working as Assistant Professor, University Law College, University of the Punjab, Lahore

Mr. Samee Uzair is working as Assistant Professor, University Law College, University of the Punjab, Lahore
