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EMERGENCY POWERS OF THE INDIAN PRESIDENCY: AN ASPECT  
OF COMPARATIVE CONSTITUTIONAL DEVELOPMENT  
IN THE UNITED STATES AND INDIA

by

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## INTRODUCTION

The history of the office of the presidency in both India and the U.S.A. is a history of growing influence, prestige and authority. The constitutional provisions and the change of circumstances have been mainly responsible for this fast growth of power. The fundamental laws of the nation, as well as the unwritten constitution, require that each president justify his approach to the work of his office. Although the constitution of the U.S.A. does not speak of emergency powers in clear terms as does the Constitution of India, yet, in many cases, the president of the U.S.A. has issued orders containing the force of emergency powers. On the other hand, the Indian president has exercised this power as granted to him by the Constitution of India. Both of these presidencies have exercised this authority for the safety and welfare of their respective states. But there have been some doubts about the genuineness of this use of authority in the past. This research paper will try to find out the answers to all such doubts.

The fundamental questions to which this research paper will try to secure answers to are the following:

1. Is there any need for this power--emergency power--incorporated in the written constitution of the state?
2. Have emergency powers--implied or explicit--been used in the past with caution or carelessly, frequently or with long intervals, and with what end in sight?
3. Has this power brought any effective changes in the office of

the presidency in the United States and India during the past fifteen years?

The sources of this research will be fairly extensive. The most important sources will be books, published articles, periodicals, the Congressional Digest, the Congressional Record, the Constituent Assembly Debates (India), the Parliamentary Debates, and memoirs of some of the former presidents of both countries. Also, government documents, government bulletins and daily papers will supply valuable materials to this project.

## CHAPTER I

### A STUDY OF INDIAN AND THE U.S. CONSTITUTIONAL PHILOSOPHIES

In this age of nuclear weaponry and outer space exploration, the words of Abraham Lincoln, ". . . government of the people, by the people, and for the people . . .",<sup>1</sup> are still valid both in the United States and India. Both the United States and Indian constitutions have pinned faith in the philosophy that the people are the source of sovereignty. The Preamble to the United States Constitution reads:

We the People of the United States, In Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>2</sup>

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<sup>1</sup>William E. Barton, Lincoln at Gettysburg (New York: Peter Smith, 1950), p. 82.

<sup>2</sup>Preamble to the Constitution of the United States.

The Preamble of India's Constitution expresses the same ideology in a different style, with similar political, social and economical ends.

It says:

WE, THE PEOPLE OF INDIA, Have solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, Social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity, and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.<sup>3</sup>

Both of these constitutions have numerous points in common, one of which is their basic concept of democratic values. These values, equality, liberty and fraternity, have, on many occasions, been put to trial in both India and the United States, and they have survived the tests.

The Constitution of India, like the Constitution of the United States, declared that India is a sovereign democratic republic. The President of India is to be elected for a number of years through indirect election by the people. This philosophy of republicanism and democratization of the office of presidency has its source in the Constitution of the United States.<sup>4</sup> The democratic nature of the constitution is emphasized by the fact that the system of universal adult franchise has been accepted as the guiding principle of election to public offices.

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<sup>3</sup>Preamble to the Constitution of India.

<sup>4</sup>Durga Das Basu, Commentary on the Constitution of India (third edition; Calcutta: S. C. Sarkar & Sons Ltd., 1956), Vol. II, p. 417.

The Constitution of India, like the Constitution of the United States and unlike that of Great Britain, is a written constitution. It contains 395 Articles and 8 Schedules. The Indian Constitution, unlike the U.S., is a bulky one and probably the lengthiest in the whole world.<sup>5</sup> The bulk of the constitution is due to many causes. The constitution contains not only the broad principles as we find in the Constitution of the United States, but also the details of administration. The Indian Constitution provides not only for the administrative machinery at the center, but also of the units or states. The units of the Indian Union, unlike the U.S.A., the U.S.S.R. and Canada, are of many kinds and provision had to be made separately for each one of them. The incorporation of the Fundamental Rights and the Directive Principles of State Policy, and other similar provisions, have made this constitution a bulky constitution. The Indian Constitution provides for amendment, the pertinent provision being Article 368<sup>6</sup> which provides that a bill for amendment must be passed by each House by a majority of the total number of members of the House in any case not less than two-thirds of the members of the House present and voting and receive the assent of the President. This special majority is not required in case of some provisions of the Constitution. Some of the provisions of the Constitution require for their amendment ratification by Legislatures of not less than half of the States after they are passed by the Houses of the Parliament with a two-third majority and before they are presented to the President for assent. This method of amendment is

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<sup>5</sup>R. R. Sethi and Vidya Dhar Mahajan, Indian Constitution and Administration (Delhi: S. Chand & Co., 1954), p. 78.

based on the doctrine that what the people have created, the people can change.

The United States Constitution has its Bill of Rights, the name usually given to the first eight amendments. The Fundamental Rights in India's Constitution are the Indian counterpart of these provisions in the U.S. Constitution. India's Fundamental Rights include freedom of speech and expression, the right to assemble peacefully, freedom of religion, freedom from discrimination against a citizen on grounds of religion, race, sex or place of birth. The Indian Constitution, like the United States Constitution, provides a guarantee against self-incrimination,<sup>7</sup> and abolishes traffic in human beings and other similar forms of forced labor.<sup>8</sup>

India and the United States, to a large degree, share a philosophy respecting the relation of the State to the Church. Some 2,000 years ago, Jesus advised, "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's" (Luke 20:25). This political philosophy is the root of the present day doctrine of separation of Church and State that operates in the United States. That doctrine found expression in the First Amendment to the U.S. Constitution. Separation of Church and State is also reflected in India's basic charter.

The Indian Constitution, like the U.S. Constitution, provides for a federal form of government. It establishes a dual polity. The dual polity consists of the Union at the center and the State at the periphery,

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<sup>7</sup>The Constitution of India, Article 20 (3). See Appendix.



each endowed with sovereign powers to be exercised in the field assigned to them, respectively by the constitution. The powers of the Union and the State are clearly demarcated. The Constitution is written and enactments in excess of the assigned powers by either the Union or the State legislatures are invalid. Moreover, no amendment which makes any changes in the status or powers of the center or of the units is possible without the concurrence of the Union and a State majority. The Constitution also establishes a Supreme Court to decide disputes between the Union and the States. The Supreme Court also acts as the interpreter of the Constitution. However, there are some provisions in the Indian Constitution that go to make it a semi-federal constitution or in other words--a quasi federal constitution. It can be said that the Indian Constitution establishes a unitary State with subsidiary federal features rather than a federal State with subsidiary unitary features.<sup>9</sup>

The right view is that the Indian Constitution is a federal one. It does not violate the essentials of a federal polity.<sup>10</sup> However, certain changes have been made with a view to adjust the federal system to the needs of India. The federal polity of India can be converted into a unitary polity in times of emergency only and not otherwise. This only shows that the Indian Constitution is so flexible that it can be adjusted to meet any crisis that faces the country. In the Constitution of Switzerland also, it is

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<sup>9</sup>G. N. Joshi, The Constitution of India (London: MacMillan and Co., Limited, 1950), p. 39; K. C. Wheare, Federal Government (second edition; London: Oxford University Press, 1951), p. 28.

<sup>10</sup>Durga Das Basu, Commentary on the Constitution of India (third edition; Calcutta: S. C. Sarkar & Sons Ltd., 1956), Vol. I, p. 12.

provided that the federal government can intervene in any canton if disorder in the canton endangers the safety of the State. During the first and second world wars, the defense powers of the federal government was given so extended an interpretation by the courts of the U.S.A., Australia and Canada, that those countries behaved more like unitary than federal States.<sup>11</sup>

India's Constitution has features not found in the Constitution of the United States. For example, Article 16 (1) provides that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."<sup>12</sup> Article 24 provides that "no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."<sup>13</sup>

An even more striking feature of the Indian Constitution, not found in the United States Constitution, is the provision for preventive detention, Article 22 (4)-(7),<sup>14</sup> at the discretion of the executive.

Another feature of the Indian Constitution which is not found in the United States Constitution is the Directive Principles of State Policy contained in Articles 36 to 51. These directive principles set forth the economic, social, and political goals of the Indian Constitutional System.

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<sup>11</sup>William O. Douglas, We the Judges (New York: Doubleday & Company, Inc., 1956), p. 37.

<sup>12</sup>The Constitution of India.

<sup>13</sup>The Constitution of India.

<sup>14</sup>The Constitution of India. See Appendix.

In these directive principles of State policy will be found the entire philosophy on which the "welfare state" in any modern community is founded.<sup>15</sup> They speak of the attainment of Justice--social, political and economic--and liberty of expression, belief, faith and worship.

#### THE NATURE OF THE PRESIDENCY: INDIA

The Constitution of India has adopted the British model of the Cabinet System of responsible government. On the question of the form of government, opinion in the Constituent Assembly was at first divided. There were those who advocated the adoption of the presidential system of government prevalent in the United States of America.<sup>16</sup> They had two major arguments in support of their view. First, the presidential form of government enables the executive head (the President) to be elected directly by the people. Secondly, what India needed most was a stable government. A presidential system could insure stability as the head of the executive was elected for a fixed period.<sup>17</sup> However, those who advocated the presidential system formed only a small minority in the Assembly.

The decision to adopt the cabinet system was the result of a long debate in the Constituent Assembly. The two issues which were raised during

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<sup>15</sup>Douglas, op. cit., pp. 26-27.

<sup>16</sup>Debates in the Constituent Assembly of India, Vol. VIII (Delhi: Government of India Publication, 1950), pp. 975-980. K. T. Shas was the most ardent champion of this group.

<sup>17</sup>C.A.D., Vol. VIII, p. 284.

the discussion were (1) what would make for the strongest executive consistent with a democratic constitutional structure; and (2) what was the form of executive which was suited to the conditions of this country.

Giving his views in answer to these questions, Mr. K. M. Munshi said:

The strongest government and the most elastic executive has been found to be in England and that is because the executive powers rest in the Cabinet supported by a majority in the Lower House which has financial power under the Constitution. As a result, it is the rule of the majority in the legislature; for it supports its leaders in the Cabinet, which advises the head of the State, namely, the King . . . We must not forget a very important fact that, during the last hundred years, Indian public life has largely drawn upon the traditions of British constitutional law. Most of us looked up to the British model as the best . . . Our constitutional traditions have become parliamentary and we have now all our provinces functioning more or less on the British model.<sup>18</sup>

These considerations were reinforced by two additional arguments of special significance from A. Krishnaswami Aiyar.<sup>19</sup> The first of these related to the form of government in the States. The presidential form of government would have meant that the administrators of the States would have been invested with real executive power and the legislature would have been confined purely to their legislative functions.

Secondly:

There are obvious difficulties in the way of working the Presidential system. Unless there is some kind of close union between the Legislature and the Executive, it is sure to result in a spoils system. . . Parliament may take one line of action and the Executive may take another line of action. An infant democracy cannot afford, under modern conditions, to take the

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<sup>18</sup>C.A.D., Vol. VIII, p. 989.

<sup>19</sup>M. V. Pylee, Constitutional Government in India (Bombay: Asia Publishing House, 1960), p. 324.

risk of a perpetual cleavage, feud or conflict between the Legislature and the Executive. The object of the present constitutional structure is to prevent a conflict between the Executive and the Legislature and to promote harmony between the different parts of the governmental system. . . . After weighing the pros and cons of the Parliamentary Executives as they obtain in Great Britain, in the Dominions and in some of the Continental Constitutions, and the Presidential type of government as it obtains in the United States of America, the Indian Constitution has adopted the institution of Parliamentary Executive.<sup>20</sup>

Prime Minister Nehru also spoke in the Assembly on this subject and said that after giving anxious thought to this matter, they had come to the conclusion that emphasis should be given to the ministerial character of the government and power resided in the Ministry and Legislature and not in the President as such.

Since India is a republic, the Constitution provides for a President of India and the executive power of the Union government, including the supreme command of the defense forces, is vested in him.

## CHAPTER II

### EMERGENCY PROVISIONS IN THE CONSTITUTIONS OF INDIA AND THE U.S.A.

Peaceful climate may change and certain adversities may happen to the daily life of a nation. To meet these, modern constitutions provide the president with powers to deal with in order to protect people and nation, and maintain order and tranquility. The Indian Constitution has, by Part XVIII, provided the executive with ample powers to meet abnormal or emergency situations. Part XVIII speaks of the emergency provisions

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<sup>20</sup> Pylee, op. cit., p. 324.

under the Constitution of India. This part visualizes three different types of abnormal situations: (1) an emergency due to internal disturbance or external aggression; (2) failure of constitutional machinery in the States; and (3) financial emergency.

#### EMERGENCY DUE TO INTERNAL DISTURBANCE OR EXTERNAL AGGRESSION

Article 352 of the Indian Constitution speaks that "if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect."<sup>21</sup> The President of India used this right to proclaim emergency during Chinese aggression on Indian soil which caused danger to national security and existence. This emergency is still in effect. The Constitution of India empowers the Chief of the State--the President--to issue a proclamation of emergency before the actual occurrence of war, aggression or disturbance, if he alone is satisfied that there is such danger in sight. This power to proclaim emergency has been placed subject to two restrictions. First, the proclamation has to be placed before each House of Parliament. The Constitution does not, however, specify the period during which this obligation has to be fulfilled. Secondly, the proclamation ceases to be operative at the expiration of two months unless before the expiration of this period, the Parliament has given its approval

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<sup>21</sup>The Constitution of India.

to the President's proclamation.

#### FAILURE OF CONSTITUTIONAL MACHINERY IN THE STATES

Article 356 empowers the President to make proclamation whenever he is satisfied that the government of a State cannot be carried on in accordance with the provisions of the Constitution either on the report of the Governor or otherwise.

This provision means that the failure of a State government to work according to the Constitution, in circumstances which have no necessary connection with external aggression, internal disturbance or violence, though these may be the cause of failure in particular cases, empowers the President to declare emergency.<sup>23</sup> A failure within the meaning of the present Article may probably arise also in the case of abuse of constitutional powers by a State government. In the States of Andhra and the Punjab and also in Orissa, party politics paved the way for the President to proclaim emergency. After the fall of the ministry in Andhra by a vote of no confidence and after the resignation of the ministries in the Punjab and Orissa, presidential rule was introduced on the alleged ground that no alternative ministry could be formed.

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<sup>22</sup>  
The Constitution of India.

Article 360 provides that "if the President is satisfied that a situation has arisen whereby the financial stability or credit of India or any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect."<sup>24</sup>

All the provisions regarding political emergency (Article 352) shall apply to this proclamation of financial emergency. During the period this proclamation is in operation, the executive authority of the Union extends to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose. Notwithstanding anything contained in the Constitution (a) any such direction may include (1) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State; (2) a provision requiring all Money Bills or other Bills to which the provisions of Article 207<sup>25</sup> apply (Financial Bills) to be reserved for the consideration of the President after they are passed by the Legislature of the State; and (b) it is competent for the President during the period any Proclamation of financial emergency is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

The issue of a proclamation of emergency has a twofold consequence.

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<sup>24</sup>The Constitution of India.

<sup>25</sup>The Constitution of India. See Appendix.



In the first place, it virtually amounts to the negation of the federal character of the Constitution. The States affected by the proclamation get reduced to a position of a county council of a unitary State. Under Article 353<sup>26</sup> the executive powers of the States are brought directly under the supervision and control of the Union government. Secondly, the Union Parliament gets authority to make laws on any matter and confer powers and impose duties on Union and officers of the Union even though the matter is not in the Union List.

This shows that the distribution of powers between the Union and the units may be completely changed by proclamation of emergency by the President. The Union by this proclamation gets a chance to encroach upon the authorities of the States and reduce the State's position to a subordinate unit of a unitary system.

#### EMERGENCY POWERS UNDER THE UNITED STATES CONSTITUTION

In the U.S.A. Constitution there are no separate provisions dealing with abnormal situations. As the Supreme Court of the United States observed in Schechter Poultry Corp. v. U.S.:

Extraordinary conditions do not create or enlarge constitutional power. The constitution established a national government with powers deemed to be adequate, as they have proved to be in both war and peace, but these powers of the national government are limited by the constitutional grants.<sup>27</sup>

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<sup>26</sup>The Constitution of India. See Appendix.

<sup>27</sup>Schechter Poultry Corp. v. U.S., (1935) 295 U.S., 528.

Chief Justice Hughes propounded a sound philosophy of American constitutional law by observing that emergency does not create any power or grant any authority to the executive to superimpose its claim on others. In another important case, Home Building & Loan Association v. Blaisdell, Chief Justice Hughes opined:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of powers of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under the constitutional system.<sup>28</sup>

Thus, the President of the United States can not exercise any extraordinary powers in view of any emergency. While emergency does not create power, emergency may furnish the President an opportunity for exercise of a power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed" by the President.<sup>29</sup> The court has always tried to be reasonable to such use of power at a time of real emergency and war. As Justice Holmes said in the Schenck Case:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured as long as men fight and no court could regard them as protected by any constitutional right.<sup>30</sup>

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<sup>28</sup>Home Building Association v. Blaisdell, (1933) 290 U.S., 425, . .

<sup>29</sup>Wilson v. New, (1918) 245 U.S., 332-348. . .

<sup>30</sup>Schenck v. U.S., (1919) 249 U.S., 52. . .

Under Article 355 of the Indian Constitution the Union is under obligation "to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution."<sup>31</sup> This provision has its origin in the United States and Australian constitutions. The Constitution of the United States provides:

The United States shall guarantee to every state in the union a republican form of government and shall protect each of them against invasion and on application of the Legislature or of the Executive (when the Legislature can not be convened) against domestic violence.<sup>32</sup>

Likewise, Section 119 of the Australian Constitution reads: "The Commonwealth shall protect every state against invasion and, on the application of the Executive Government of the State, against domestic violence."<sup>33</sup>

The duty imposed on the federal government in the United States to guarantee the republican form in the States may lead one to think that it may prohibit or suspend such State governments as do not, in its judgement, conform to the requirement. But there has been no instance in practice so far to the effect that the Government of the United States has suspended or interfered with a State government on the ground that the latter has failed to perform its constitutional obligations.<sup>34</sup>

In the cases<sup>35</sup> that brought this clause before the Court in the

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<sup>31</sup>The Constitution of India, Article 355.

<sup>32</sup>The Constitution of the United States, Article IV, Section 4.

<sup>33</sup>The Constitution of Australia, Section 119.

<sup>34</sup>Luther v. Borden (1848) 7 How 1. Pacific States Tel. Co. v. Oregon (1912) 223 U.S. 118 Eckerson v. Des Moines (1908) 137, Iowa 452.

<sup>35</sup>Ibid.

United States it was held that the maintenance of representative institutions is sufficient to maintain a republican form of government. In the United States of America, if, on account of domestic violence, the working of the State government becomes impossible, the Union government may come to the aid of the State government with its military forces, if required--but only at the request of the State. The decision taken by Congress in this regard can not be challenged in a court of law. Similarly, in cases of domestic violence, it is for the Congress to determine the measures which should be adopted to make the guarantee effective. In Texas v. White, it was pointed out that the power to enforce this guarantee is primarily a legislative power and resides in Congress.<sup>36</sup>

It has been established beyond reasonable doubts that in the United States if the disturbance interferes with the operation of the national government itself, the processes of the Federal Courts or the movement of the inter-state commerce, the Union may send its troops on its own initiative, without waiting for the application of the State authorities. The late President Kennedy sent federal troops to secure the admission of Mr. Meredith a negro, to the Mississippi University and thereby enforced the decree of the Federal Court,<sup>37</sup> even though flouted by Governor Barnett. President Eisenhower also used federal troops in the Little Rock, Arkansas, integration crisis.

The authority to send federal troops is based on the right of the

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<sup>36</sup>Texas v. White, 7 Wall 730 U.S. 223, 123.

<sup>37</sup>In re Debs (1895) 158 U.S., 564.

Union to execute the federal laws and to maintain its authority on every foot of the national territory. The action of President Cleveland in sending federal troops during the Chicago strike in 1894 was upheld by the Court. In the course of the judgement, the Court observed:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national power . . . entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation o mails.<sup>38</sup>

Unlike the U.S.A., in India the power to intervene is granted to the president under the Constitution and not to the Parliament-legisla-  
ture. This doctrine of intervention can be worked by the federal govern-  
ment even if there is actually no internal disturbance or external ag-  
gression. The Constitution provides that the president should be satis-  
fied that there is danger to place or security of country. The presi-  
dent is also competent enough to insure that the government of a State  
is carried on in accordance with the constitutional provisions. The  
president has also authority under Article 365<sup>39</sup> read with Article 356<sup>40</sup>  
to intervene in or to give effect to any directions issued by the Union  
government under Article 256.<sup>41</sup>

The provisions of Article 356 contemplate the exercise of the

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<sup>38</sup>In re Debs (1895) 158 U.S., p. 564.

<sup>39</sup>The Constitution of India. See Appendix.

<sup>40</sup>The Constitution of India. See Appendix.

<sup>41</sup>The Constitution of India. See Appendix.

powers by the president on a report being received by him from the governor and, if the president acts under Article 356 in such a case, there is nothing unconstitutional in his doing so, and any proclamation made by him thereunder can not be challenged as ultra vires.<sup>42</sup>

In case the governor of a State does not reported to the president about the constitutional breakdown, and if the president wants to get satisfied otherwise than by a governor's report, he may in his executive capacity appoint a commission to report on the matter of internal disturbance of the State or to report whether there exists conditions in which the government of the State can not be carried on in accordance with the Constitution.<sup>43</sup> On the basis of such a report, he can receive an objective satisfaction, and then he may exercise his emergency powers to introduce president's rule in the State's administration. In case no such committee is also appointed, how should the president act? Should he accept and act according to the advice tendered by the Cabinet even if the advice is partisan?

The answers to these questions are clear if we read the Constituent Assembly Debates. It appears that the president should abide by the advice given by the Cabinet. Mr. Krishnamachari, speaking in the Constituent Assembly on this issue, observed that "the whole scheme of the Constitution has been envisaged on the basis that the President is a Constitutional head

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<sup>42</sup>Journal of the International Commission of Jurists, Kerala Enquiry Committee Report, p. 199.

<sup>43</sup>G. K. Sastry, "The Constitutional Implications on President's Rule in Kerala," Supreme Court Journal, Vol. XXII (Delhi: Government of India Press, 1959), p. 165.

even though we have not put it in so many words."<sup>44</sup> Alladi Krishnaswami Iyer has also tried to explain the position of the president in these words:

The President means the Central Cabinet responsible to Parliament in which are representatives from various units which form the component parts of the federal government. Therefore, if the Provincial machinery fails, the Central Cabinet assumes the responsibility of the Provincial Cabinet.<sup>45</sup>

But, if we examine the relevant provisions of the Constitution, we arrive at an altogether different conclusion. The framers of the Constitution explained that they had outlined the position of the president on the Irish model, viz., that of an elected president acting on the advice of the ministers responsible to the legislature.<sup>46</sup> It may thus be seen that there is an intelligible difference between the intention of the framers of the Constitution and the language of the articles defining the powers and functions of the president.

With regard to the exercise of the emergency powers no definite answer can be given as to whether the president would always and in all cases abide by the advice tendered by the Cabinet. It may, however, be said that the president, being head of the entire State at large, standing outside the clash of interests, and being on oath to protect and defend the Constitution, may refuse to act according to the advice of the Council of Ministers if it is palpably partisan. The International

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<sup>44</sup>C.A.D., Vol. IX, p. 150.

<sup>45</sup>Ibid.

<sup>46</sup>Basu, Commentary on the Constitution of India, op. cit., Vol. I, p. 416.

Commission of Jurists in their Kerala Enquiry Committee Report observed:

...the President occupying the responsible position that he does under the constitution would not merely tow the line with his Council of Ministers but would considerably hesitate to bow to the dictates of the Council and sign on the dotted line, if his better sense indicated an action to the contrary.<sup>47</sup>

#### EFFECTS OF EMERGENCY PROCLAMATION

The proclamation of emergency due to external aggression or internal disturbance differs from the proclamation of emergency due to the failure of constitutional machinery in the State. The fundamental difference is that in the former case the right to move the Courts for the enforcement of fundamental rights is liable to be suspended and the State would be free from the limitations imposed by Article 19<sup>48</sup> of the constitution, whereas in the latter kind of emergency, the fundamental rights of the people remain unaffected. Secondly, in case of a proclamation of failure of constitutional machinery, the government of the State concerned would be superseded by the Union. On the other hand, in case of a proclamation of emergency, the State authorities do not cease to function and the State governments are not superseded.

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<sup>47</sup> Sastry, op. cit., p. 165.

<sup>48</sup> Article 19 guarantees to the citizens certain fundamental freedoms which cannot be abridged by the State except on the grounds provided herein. See Appendix.



Referring to the provisions made in the Constitution empowering the president to suspend the fundamental rights, Mr. H. V. Kamath<sup>49</sup> observed during the Constituent Assembly Debates:

. . . The Constitution has been founded . . . on what I call the Grand Affirmation of the Fundamental Rights. We have tried to build on that edifice of democracy, but I find surmounting that edifice the arch of Great Negation . . . and article 359 to my mind is the Key-stone of the arch of autocratic reaction . . . As an autocratic negation of liberty this article takes the palm over all other Constitutions in the world.<sup>50</sup>

Commenting on the power conferred on the president to suspend the right to move the Courts for the enforcement of Fundamental Rights, Mr. Saxena<sup>51</sup> said:

When we were in jail in 1942, even though it was during the war, the foreign Government did not think it fit to deprive us of habeas corpus. So if the power is given to the President to abrogate this right, it will be a slur on our Constitution, and it should not be allowed to be included in it.<sup>52</sup>

Also pointed out was the fact that no such provision was included either in the Canadian or in the Australian constitutions.<sup>53</sup>

#### EFFECTS OF HABEAS CORPUS IN THE UNITED STATES

In the United States, Article 1 Sec. 9 (2) of the Constitution

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<sup>49</sup>C.A.D., Vol. IX, p. 177.

<sup>50</sup>Ibid., p. 178.

<sup>51</sup>Ibid.

<sup>52</sup>Ibid.

provides: "The privilege of the Writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."<sup>54</sup>

It follows from this article that nothing short of actual invasion or rebellion may justify the suspension of this writ. The power to suspend the writ, as observed by Chief Justice Marshall, lies with the Congress. He said:

If at any time the public safety should require the suspension of the powers vested by this act (granting jurisdiction) in the courts of the United States, it is for the Legislature to say so. The question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed, this court can only see its duty and must obey the laws.<sup>55</sup>

During the earlier part of the Civil War, Lincoln issued proclamations suspending the writ and ordering wholesale arrests without warrants, detentions without trials and imprisonments without judicial convictions. In *Ex Parte Merryman*<sup>56</sup> Chief Justice Taney said that suspension of the writ was a legislative power which the president could not exercise, and observed that the president had "thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of administering the laws, and substituted a military government in its place to be administered by military officers."

Now it is admitted by all authorities on the American Constitution that the president has no power to suspend the writ without the sanction

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<sup>54</sup>The Constitution of the United States, Article 1, Sec. 9.

<sup>55</sup>*Ex Parte Borman* 4 Cr 75.

<sup>56</sup>17 Fed. Cas. 114, 152 (1861).

of Congress. And it is for the Courts to determine whether conditions have arisen which would justify the suspension. Thus in *Ex Parte Milligan* the Supreme Court held that a threatened invasion would not justify the suspension.

It is only the writ of habeas corpus that can be suspended by the Legislature either during war or any other emergency. The Bill of Rights can be suspended only by an amendment of the Constitution.<sup>1</sup> As observed by Mr. Justice Davis:<sup>57</sup>

The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this they limited the suspension to one great right; and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained, that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.

The Court went on to add in memorable words:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its (Bill of Rights) provisions can be suspended during any of the great exigencies of the Government.<sup>58</sup>

In another case the same Court held that "even war does not remove Constitutional limitations safeguarding essential liberties."<sup>59</sup>

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<sup>57</sup>*Ex Parte Milligan* 4 Wall 2 (1866).

<sup>58</sup>Ibid.

<sup>59</sup>House Building Association v. Blaisdell, (1933) 290 U.S., 398.

Of course times have changed since the above pronouncements by the Supreme Court, but the words contain such a perennial truth that they should ever ring in the ears of men who ardently desire constitutional government. That the Court, even now, will not hesitate to apply the Constitution's limitations to action taken in time of the emergency of war and sought to be justified under the war powers may be seen from the Steel Seizure case<sup>60</sup> in which the Court held unconstitutional President Truman's seizure of steel mills during an industrial strike in the midst of the Korean War on the ground that the president had invaded the war powers confided to Congress by the Constitution. The pronouncement of the Supreme Court that the Constitution of the United States applies in war and peace is still valid. This does not, however, mean that the Executive has no ample powers in times of extreme emergency. During the great exigencies of Government, the Courts have never hesitated to allow wide powers to the Executive, and have upheld as valid such executive and legislative action as would not be allowed in normal times by liberally construing the term "executive power."

In India, it is the executive authority that is empowered to suspend constitutional guarantees in times of war as well as in times of peace, for a proclamation under Article 352<sup>61</sup> may be made not only when

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<sup>60</sup>Basu, Commentary on the Constitution of India, op. cit., Vol. II, p. 550.

<sup>61</sup>The Constitution of India, Article 352. If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

there is external aggression or internal disturbance, but also when there is "imminent danger" thereof according to the satisfaction of the president, which is final on this point. So, when a proclamation of emergency is made by the president, the citizen during the operation of emergency, has no protection against the legislative, executive or local authorities as the State is free from the limitations imposed by Article 19, which guarantees to the citizens the freedom of speech, the freedom of movement, the freedom of occupation and right to acquire, hold and dispose of property.

Article 359<sup>62</sup> empowers the president to suspend the right to move the Court for the enforcement of any of the Fundamental Rights guaranteed by the Constitution. This right, it may be noted, is of great value as it makes the other rights workable, real and concrete as it enables any citizen to seek relief or remedy in the court of law. The suspension of this basic right will be in force during the operation of the emergency or still such shorter period as may be specified in the order of the president. This article does not specify the definite time within which the order must be placed before the Parliament. It does not also empower the Parliament to revoke the order. Viewed from this angle of vision, the powers conferred on the Executive, over which there is no judicial review, go far beyond what is actually necessary.

#### PRESIDENT-CABINET RELATION IN THEORY AND PRACTICE

Taken as a whole and on their face value, the presidential powers

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<sup>62</sup>The Constitution of India. See Appendix.

are formidable indeed. There is hardly any other constitution which gives such a long and detailed list of powers to its Chief Executive. The question, however, is how far all or any of these powers will be really exercised by him. On the answer to this question will depend the real position of the president in the governmental system established by the Constitution, rather than what may appear from a literal reading of the constitutional provisions.

This question was discussed at length in the Constituent Assembly at different times and each time the point that was stressed most was the constitutional character of the head of the State. Introducing the Draft Constitution, Dr. Ambedkar, the then Law Minister, said:

In the Draft Constitution there is placed at the head of the Indian Union a functionary who is called the President of the Union. The title of this functionary reminds one of the President of the United States. But beyond identity of names there is nothing common between the form of government prevalent in America and the form of government proposed under the Draft Constitution. The two are fundamentally different. Under the Presidential system of America, the President is the Chief head of the Executive. The administration is vested in him. Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the nation but does not rule the nation. He is the symbol of the nation.<sup>63</sup>

During the general discussion of the Constitution, at the concluding stage, T. T. Krishnamachari said:

It has been mentioned that one of the chief defects of this Constitution is that we have not anywhere mentioned that the President is a constitutional head and the future of the President's power is, therefore, doubtful . . . This is a matter which has been examined by the Drafting Committee to some extent. The position of the President in a responsible government is not the same as the position of a President under a representative

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<sup>63</sup>C.A.D., Vol. VII, p. 32.

Government like America and that is a mistake that a number of people in the House have been making, when they said that the President will be an autocrat, and no one appears to realise that the President has to act on the advice of the Prime Minister . . . So far the relationship of the President with the Cabinet is concerned, I must say that we have, so to say, completely copied the system of responsible government that is functioning in Britain today; we have made no deviation from it and the deviations that we have made are only such as are necessary because our Constitution is federal in structure.<sup>64</sup>

With this background in view, one may examine the constitutional provisions that deal with the relationship of the president with the Council of Ministers in order to see how far these claims are justified. Article 74 is important in this connection. It provides:

1. There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.
2. The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into any court.<sup>65</sup>

Article 75 clarifies the position of the president. It States

1. The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister;
2. The Ministers shall hold office during the pleasure of the President;
3. The Council of Ministers shall be collectively responsible to the House of the People.<sup>66</sup>

These provisions, taken as a whole, fairly establish the claim of

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<sup>64</sup>C.A.D., Vol. X, p. 956.

<sup>65</sup>The Constitution of India, Article 74.

<sup>66</sup>The Constitution of India, Article 75.

Ambedkar and his colleagues that the authors of the Constitution wanted to adopt the British pattern of Cabinet government. At the same time, it is also clear that they did not want to use expressions which would take away the flexibility that is the heart and soul of the British system. The difficulty of the Drafting Committee was to state precisely in a written constitution certain well-established constitutional conventions that regulate the relationship between the King and the Cabinet in Britain. This is why, while certain provisions convey their meaning in unmistakable terms, there are others that are not equally clear. Thus, it is quite clear that, for the exercise of his functions, there must be a Council of Ministers with the Prime Minister at the head to aid and advise the President. But does this mean that the President is always bound by the advice of the Council?

### CHAPTER III

#### THE UNITED STATES-INDIAN EMERGENCIES: SOME CASE STUDIES

During the fifteen years of existence of the Indian nation as a republican form of government, there arose, more than once, occasions for a proclamation of emergency by the President of India. In most of the cases in which he proclaimed emergency and took over powers of administration from the State or States involved, the main reason was failure of the State machinery under the stress of some impending disaster, to run the government according to the provisions of the Constitution. These were semi-anarchical affairs and the elected representative of the people of the State who were to control and manage the House found themselves in a state



of complete helplessness, and the governor, the source of administrative authority representing the State Government, had to inform the president about the whole affair. The president, on receipt of this information, and having ascertained its reliability, thereupon proclaimed an emergency under Article 356, and assumed to himself responsibility for all the functions of the State administration.

#### THE PUNJAB

The first instance of the proclamation of emergency took place, under Article 356, on June 20, 1951, in the Punjab where an alternative ministry could not be formed after the resignation of Dr. Gopichand Bhargava's Cabinet. The proclamation was made after the governor of the Punjab reported to the president that there was no constitutional machinery to perform the tasks entrusted to the administrators by the Constitution to run the democratic form of government. The president, thereupon, promulgated two orders under Article 356 (viz., S.R.O. 925 and 926)<sup>67</sup> and took over the charge of the State.<sup>68</sup>

The president later on delegated all the power he assumed under the article of the Constitution to the governor of the State, who as agent of the president, carried them out. The legislative power of the State was given to the Parliament of the Union. The emergency, however,

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<sup>67</sup>Gaz. of India, Extraordinary, d. 20-6-51, Pt. II, Sec. 3. See Appendix.

<sup>68</sup>Basu, Commentary on the Indian Constitution, op. cit., Vol. II,

existed for a short period and Parliamentary government was re-established. The federal government tried its best to pave the way for re-establishment of Parliamentary government in the State. The president did not want to keep the State under his thumb for a long time and no sooner the ground was ready for freeing the State from presidential rule, the president withdrew his authority and released the State to play its role and run its government based on the principles of the Constitution. This shows that the president was not keen on keeping a unit of the federation under his control longer than was absolutely necessary for the welfare and good management of the State.

#### PATIALA AND EAST PUNJAB STATE UNION

The second occasion for the proclamation of emergency arose in 1952 when, after the first general election, the formation of a stable ministry was found impossible in the PEPSU State. There was ministerial instability, administrative lawlessness, and growing fear of constitutional breakdown. There was, first of all, a Congress ministry which soon lost its majority in the Legislature. A coalition ministry which followed it was also not in a position to command a majority in the Legislature. The coalition ministry had a very hard time to run the administration as there was dissension and conflict within the ministry itself. The Rajpramukh brought this state of affairs to the notice of the president. On receipt of this information, the President used, for the second time, the power granted to him by Article 356 and proclaimed emergency on March 4, 1953. This emergency

lasted until March 7, 1954. As a result of the proclamation, the State legislature was dissolved; the ministry quit the office. The president appointed a civil service officer as adviser to the Rajpramukh to carry on the administration during the emergency. The new elections were held within six months, and the Congress Party won a majority of the seats in the Legislature and formed a stable ministry.

#### ANDHRA

The third time the president utilized the powers to proclaim emergency was in 1959 on the 15th of November, under the pressure of unusual circumstances. The newly created Andhra State's ruling Prakasam Ministry was defeated on the question of prohibition by an alliance between the Communist and P.S.P. parties. The Prakasam Ministry was supported by the Congress and some independent members of the Legislature. The coalition group that passed a motion of no-confidence was a mixture of many ideologies and party affiliations. Naturally, it became impossible for the opposition parties to form a new ministry. This dilemma and difficulty on the part of opposition parties to unite and form a new ministry gave rise to public unrest. The public opinion was gaining momentum for holding another general election to elect representatives to the Legislature. But the defeated Prakasam Ministry was unwilling to carry on even as a caretaker government during the period needed for the holding of the new election. The governor reported to the president all about this unusual political situation and on the basis of this report, the president

proclaimed the emergency and took over the administration of the State. The president's rule ended with the formation of a stable government after the new election in 1954.<sup>69</sup>

#### TRAVANCORE-COCHIN

The president in 1956 again proclaimed an emergency when the then Congress Ministry of the former State of Travancore-Cochin resigned as a result of its inability to command a majority party position in the Legislature. No other party was in a position to form an alternative ministry; taking over the administration of the State was the only solution left to the president. The emergency lasted for about a year during which the new State of Kerala was formed and the second general elections held. Although the election did not give a chance to any political party to form ministry on the basis of its strength in the State Legislature, yet, a coalition ministry was formed with the Communist and independent members of the Legislature. This made possible the restoration of parliamentary government in the State in 1957.<sup>70</sup>

#### KERALA

On the 31st of July, 1959, the president issued another proclamation

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<sup>69</sup> Basu, Commentary on the Indian Constitution, op. cit., Vol. II, p. 544.

<sup>70</sup> Pylee, op. cit., p. 586.

taking over the charge of the State administration in Kerala from the then Communist Ministry. This act was necessitated by the deteriorating conditions of political life in the State. The Communist Ministry, which came to power in April, 1957, by election, was becoming very unpopular. There were public agitations, strikes, and some acts of violence against the laws passed by the Communist-controlled Legislature. By early 1959, this popular unrest assumed formidable proportions. A State wide disobedience movement was launched against the ministry, demanding its immediate resignation from office. This movement produced chaos and disorder and it became particularly impossible for the administration to run the State. The governor of the State reported to the president that, after studying the situation, he had come to the conclusion that the administration of the State could not be carried on in accordance with the Constitution any longer. On this information from the governor, the president assumed powers to run the State. Here, in this case, it may be said that the Communist Ministry was still commanding full support of the Legislature when the president took over the administration of the State. This was an unusual case in which there was no vote of no-confidence against the ministry nor ministerial instability was the problem of the time. The public unrest and popular agitations created a situation in which the governor had to report to the president about the anarchic and chaotic conditions of the State affairs. The Report of the Governor, a voluminous document, explained the justification for the president to declare emergency and take over charge of the government.<sup>71</sup>

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<sup>71</sup>Pylee, op. cit., pp. 586-587.

Recently, also, the president has exercised this power to take over control of State administration. The latest victim of this power is Kerala State where the presidential rule is still in practice. The last general election held a few months back could not produce any single party majority in the State Legislature. The result of this was that there could not be an opportunity for the governor to ask any party to form a ministry. This state of affairs paved the way for the president to run the administration of the State with the help of the governor of the State.

For the first time in the history of the Indian republic, the president proclaimed emergency under Article 352<sup>72</sup> when the Chinese made an aggression on the northeastern border of India. This time the president issued the emergency order realizing that the safety of the nation was in danger because of external aggression. The emergency is still in existence (1965) and the president has signed several Acts, passed by the Parliament, to maintain law and order and to meet the Chinese threat.

#### WAR POWERS: THE UNITED STATES PRESIDENT

Even though the United States Constitution speaks nothing about the emergency powers of the president, it does speak of the war powers of the president to meet the pressing demands of war. Natural or designated national emergencies have given the opportunity to the president to use his authority in handling the affairs of some of the fields even without authorization

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<sup>72</sup>Quoted on p. 25.

from the Congress. In the past, Abraham Lincoln used the emergency of civil war to summarily arrest an individual and ignored Chief Justice Roger Taney's decision that he had no power to do so. The Chief Justice confessed the inability of the Court to enforce its decision.<sup>73</sup> President Hayes used troops to put down a railroad strike and President Cleveland used them again to prevent a Pullman strike. They all used this weapon on one pretext or another, claiming it to be in their area of authority.

Following the inauguration of F. D. Roosevelt as President of the United States the use of extraordinary powers by the president came thick and fast. His tenure of office had a stormy history of the use of emergency powers. The measures he adopted to improve the economy of the nation and to meet depression caused great hardship to his administration. The National Recovery Act and other New Deal laws were the result of his conviction of the presence of emergency to which he was entitled to meet with as the head of the State. The Supreme Court of the United States outlawed several New Deal laws, but the president went on exercising emergency powers, given to him by the Congress, both in times of war and peace.<sup>74</sup>

President Truman, who stepped into the shoes of F. D. Roosevelt, followed the same argument that the president has the power to combat national emergencies vested in him by virtue of being the Commander in Chief of the Armed Forces of the United States. He evoked Article II, Section 2 of the

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<sup>73</sup>Ex Parte Merryman 17 Fed. Cas. 144 (Circuit Court, 1861).

<sup>74</sup>Donald Bruce Johnson and Jack L. Walker (ed.), The Dynamics of the American Presidency (New York: John Wiley & Sons, Inc., 1964), p. 349.

United States Constitution, which says that "the President shall be Commander in Chief of the Army and Navy of the United States," to meet emergencies both existing and anticipated. Shortly after he assumed the office of the presidency, he asked the Congress to empower him to draft railroad workers into the Army in order to stall a strike. Later on, he seized coal mines on the grounds of war emergency.

The most important case in which he used his power to meet national emergency, on the basis of his war power, deserves our attention. This study of his use of emergency powers will provide us materials to reach a conclusion about the philosophy of this source of authority to meet different problems in two different countries--India and the United States. This case would give us a chance to examine the doctrine of presidential inherent power and its relation to the rights of individuals and business enterprises.

On April 18, 1952, the President of the United States, Mr. Truman, promulgated an executive order directing the Secretary of Commerce to take possession of steel industries. This was deemed necessary if the challenge of war was to be met. The cause of this promulgation was the failure to negotiate a settlement between steel industrialists and workers to provide enough materials needed to fight a war. The examination of the background of this controversial case would be of great help to us.

In the second part of 1951, a dispute arose between the employees and employers of the steel companies over the question of terms and conditions to be included in the new bargaining agreements. Both the parties failed to reach a solution and to work out a compromise formula. In December, 1951, the representative organization of employees--United Steel Workers of



of America--served a notice on the employer expressing its desire to go on strike. The Federal Mediation and Conciliation Service tried to bring about an agreement between the parties but it failed. This failure of efforts by this organization resulted in the reference of this issue to the Federal Wage Stabilization Board by the president. The Federal Wage Board was authorized to investigate and recommend terms of settlement between the parties. But the Board also could not produce any effective result; it could not bring about a settlement. This forced the worker's union to call for a nation-wide strike commencing April 9, 1952.

This call for a strike made the president think about the national defense as steel was the most important component of substantially all weapons to carry on war. This thought of indispensibility of steel and the need to carry on with war demands necessitated the proclamation of emergency ordinances by the president to take possession of and operate most of the steel mills throughout the country. This president sent messages to Congress reporting his action; Congress ignored his message.

The companies brought proceedings against the president's act and claimed that the seizure was not legal and valid as it was not authorized by an act of Congress. This claim was opposed on the grounds that any strike disrupting steel production would endanger the safety and well-being of the country and the president has an inherent power based on constitutional provisions and practices to do anything to protect the life of the nation. Holding against the president's act on this ground, the Supreme Court issued an order declaring void the seizure of steel industries.

The Supreme Court said that the president's power to issue an order

to seize steel industries must stem either from an act of Congress or from the Constitution itself. There are no statutes which authorize the president in clear terms to take possession of private property. Nor is there any act of Congress to support his power to do so. Although there are some statutes<sup>75</sup> which do authorize the president to take both personal and real property under certain circumstances, yet, the president's order to take over steel industries has no root in those acts as the conditions to evoke those acts are not met. Moreover, the use of the seizure technique to handle labor disputes and settle them was never authorized by an congressional enactment prior to this controversy. Congress had refused to accept this principle as a method of solving labor problems. In 1947, Congress rejected an amendment to the Taft-Hartley Act, authorizing seizures of properties in cases of emergency.<sup>76</sup> The Congress thought that the technique of seizure like that of compulsory arbitration, would interfere with the process of collective bargaining.<sup>77</sup>

The Supreme Court held that as the president has no authority to issue an order to seize steel industries unless the order had its root in the provisions of the Constitution or an act of Congress. The claim made by the president that to take property in order to prevent strikes comes under his military power as Commander in Chief, is both untrue and unrealistic. In the framework of the Constitution the main job of the president

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<sup>75</sup>The Selective Service Act of 1948, 62 Stat. 604, 625-627, 50 U.S.C. App. (Supp. IV) 468; the Defense Production Act of 1950, Tit. II, 64 Stat. 798, as amended, 64 Stat. 138.

<sup>76</sup>93 Congressional Record, pp. 3637-3645.

<sup>77</sup>93 Congressional Record, pp. 3835-3836.

is to see that the laws are faithfully executed. This means that he is not a lawmaker. It is the business of the Congress to make laws regulating labor disputes and all other matters, and the president's exclusive area is to execute them.<sup>78</sup>

Thus, the Korean War, which forced the president to declare the existence of a national emergency on September 8, 1950, could not even procure to him authorities to take over private property and management. The Supreme Court decision settled the issue stating that no matter whatsoever grave emergency the nation is facing, it does not give the president the right to encroach upon individual's right to property. The Supreme Court enunciated and upheld a principle that the seizure power should be attributed to the Congress rather than to the president because Congress, consisting of many individuals, is responsible and can be trusted. The president, however, is one man and hence, presumptively irresponsible and not to be trusted.<sup>79</sup> The dissenting opinion of the Supreme Court pointed out in support of presidential act that the majority opinion has disregarded the combined constitutional practice of all three branches of government since 1790. It says:

No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the fact of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties

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<sup>78</sup>Youngstown Sheet & Tube Co. v. Sawyer, (1952) 72 Sup. Cit. 862.

<sup>79</sup>Glendon A. Schubert, Jr., "The Steel Case: Presidential Responsibility and Judicial Irresponsibility," The Western Political Quarterly, VI, No. 1, March 1953, p. 61.

under the Constitution.<sup>80</sup>

But, the majority opinion expressed that the president's seizure was in conflict with the policy of Congress expressed in the Defense Production Act of 1950, and the Labor Management Relations Act of 1947. Consequently, the president's order "violated the essence of the principle of the separation of governmental powers."<sup>81</sup>

#### CHAPTER IV

##### EMERGENCY POWERS: SOURCE OF DICTATORIAL AUTHORITY

After examining the background of some emergency proclamations both in India and the United States, we should try to find out whether these powers, implied or explicit, can make the office of presidency a dictator.

Under the Indian Constitution the office of the president appears to be a source of both love and fear, constitutional headship and dictatorship and a nominal figurehead and not real executive. It ranges from a mild obedient type of president to a wild, dangerous type of dictator. To study this unique office, we have to analyze the two dominant schools of thought which go to decide the role and powers of the Indian president under the constitutional framework. One of these may be described as a constitutional school which derives its source from the philosophy that Indian presidency is like the British Crown, a figurehead, who has to act in all cases on the advice of the Prime Minister. The other school may be described as the

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<sup>80</sup>343 U.S. 579, 705, 710 (1952).

<sup>81</sup>343 U.S. 660 (1952).

juristic school, which has its source in the wordings and terms of the written document--the Constitution of India.

A literal reading of the provisions of the Constitution relating to the president may lead one to think that the president is all powerful. Under the Constitution, he is given all executive powers of the Union, all emergency powers to meet any crisis. The vast scope of emergency powers may make the president, in the future, a strong dictator who may destroy the whole structure of democratic setup in India. This unique power of the president that may make him an autocrat, a Hitler, has been criticized by a group of political thinkers and statesmen. Mr. K. T. Shas, while opposing this grant of power to the president, observed in the Constituent Assembly that this authorization of authority to the head of the State is a clear sign of intellectual bankruptcy of the support of the provisions as these provisions would mar the progress of individual liberty and state's autonomous status. His words against the emergency provisions of the Constitution can be quoted to show his fear of the creation of a dictator-like president. He said:

Coming to this grand finale and the crowning glory of this chapter of reaction and retrogression I find one cannot but notice two distinct currents of thought underlying and influencing throughout the provisions of this chapter. (1) to arm the Centre with special power against the units and (2) to arm the government against the people . . . Looking at all the provisions of this chapter particularly and scrutinising the powers that have been given in almost every article, it seems to me, the name only of liberty or democracy will remain under the Constitution.<sup>82</sup>

Mr. B. Das and others expressed the opinion that the emergency

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<sup>82</sup>C.A.D., Vol. VIII, p. 196.

provisions of the Constitution of India would make the president the virtual head of the State. These critics pointed out that the provisions enabling the president to use emergency powers can very easily be compared with Article 48 of the Constitution of the Weimar Republic (1919) of Germany that gave birth to the rise of Hitler to supreme power.<sup>83</sup>

#### POWER TO DIRECT THE STATES

The whole chapter on emergency provisions should be thoroughly examined to find out the root of the president's opportunity to become a dictator. The effects of presidential emergency proclamations on individual liberties, state administration and finance may give us some ground to examine the scope of his future position. As regards the emergency arising out of war or internal disturbance, the effects of presidential proclamation will have a wide range to cover. The articles 353, 354, 358, and 359<sup>84</sup> deal with the expansion of presidential authority to curb and destroy, if he designs, both federalism and democracy.

Article 353 of the Indian Constitution deals with the effect of the proclamation of emergency. One effect of this proclamation will be that the executive power of the president can be extended to giving directions to any State as to the manner in which its executive power is to be exercised. In normal times, the president has no such wide range of authority in matters

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<sup>83</sup>Pylee, op. cit., p. 580.

<sup>84</sup>The Constitution of India. See Appendix.

of directing a State's executive. The second effect will be:

The power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.<sup>85</sup>

According to Article 354, the president shall have constitutional power to modify the provisions of the Constitution and lay down the allocation of financial relations between the Union and the States. But this authority will cease to operate when the emergency ceases to exist.

Under the emergency, it appears, the president shall acquire the power to give directions to a State in any matter, and though the State government will not be suspended, it shall be under the complete control of the Union executive, and the administration of the country, insofar as the proclamation goes, will function as under a unitary system with local subdivision, as in Great Britain.

#### POWER TO EXTEND THE LIFE OF THE PARLIAMENT

The president may also extend the normal five years life term of the House of People for a period not exceeding one year at a time and not exceeding a period of six months under any circumstances after the proclamation has ceased to operate.<sup>86</sup> As soon as a proclamation of emergency is

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<sup>85</sup> Basu, Commentary on the Indian Constitution, op. cit., Vol. II, p. 538.

<sup>86</sup> The Constitution of India, Article 83. See Appendix.

made, the legislative competence of the Union Parliament shall be automatically widened and the limitation imposed as regards State List shall be removed. In other words, during the operation of emergency powers, Parliament shall have the power to legislate as regards to the subjects enlisted in the State List. Though the proclamation shall not suspend the State Legislature, it will suspend the distribution of legislative powers between the Union and the State, so far as the Union is concerned, so that the Union Parliament may meet the emergency by legislation over any subject as may be necessary, as if the Constitution were unitary.

#### SUSPENSION OF FUNDAMENTAL RIGHTS

The most shocking provision of the Constitution relates to the suspension of the rights of the people under Article 19.<sup>87</sup> It also prohibits individuals to move the Court to protect them from presidential authoritative grip. This means that with the proclamation of emergency, various kinds of power will be suspended and the Judiciary will not have the right to intervene to save citizens even if their freedom is in danger or is crushed by the president. The peculiarity of the provisions relating to the suspension of fundamental right is that no distinction is made between times of war and times of peace, for a proclamation under Article 352<sup>88</sup> may be made even in cases of external aggression or internal disturbance and also not only when

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<sup>87</sup>The Constitution of India. See Appendix.

<sup>88</sup>The Constitution of India. See Appendix.



they have actually taken place, but also when there is imminent danger according to the president's satisfaction, which is final on this point.<sup>89</sup>

Here it would not be out of place to say that in England, the executive has no emergency powers except under Parliamentary authority. There is no prerogative of the Crown to make a proclamation of emergency. But while the principles of Parliamentary Sovereignty and Rule of Law are kept unimpaired even in times of war, Parliament itself endows the executive with authority to arrest without trial suspected persons by passing such acts as the Defense of Realm Act, 1914, and the Emergency Power (Defense) Act, 1939.<sup>90</sup>

#### FINANCIAL SUPERVISION

The president, after he declares a financial emergency, may be able to bring the States of the Union under his thumb as the Constitution provides the right to direct them to follow certain rules concerning finance. He can issue directions for the reduction of salaries of a or any class of employees serving the State, including the Judges of the Supreme Court and the High Courts.

#### CAN THE PRESIDENT OF INDIA BECOME A DICTATOR?

Thus, we notice that the effects of presidential proclamation of

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<sup>89</sup>Basu, Commentary on the Constitution of India, op. cit., Vol. II, p. 551.

<sup>90</sup>Ibid., p. 548.

emergency can be both devastating and destructive. The president's power declaring an emergency is a powerful weapon and a constitutional one to make the office strong and forceful. There has always been vigorous and continuous attacks on the president's authority to deprive individuals of their freedom and expelling the Judiciary to come to the rescue of freedom-deprived people. Mr. H. V. Karmath, speaking in the Constituent Assembly, said that by providing these powers to the president, the Constitution has tried to create "a State where the rights and liberties of millions of innocent men and women will be in continuous jeopardy, a State where if there be peace, it will be the peace of the grave and the void of the desert."<sup>91</sup>

The suspension of freedoms under Article 19 and the provision to move the court for enforcement of rights attract our attention in studying the scope of the Indian president's ability to become a dictator. Article 19 may be called the modern version of the Bill of Rights or a summary of "The Magna Carta." If it is taken out of the Constitution, there would be practically nothing to prove the existence of the concept of liberty. The suspension of the article by the president would kill the very nature of democracy which has its roots in the doctrine of individual freedom. During the debate in the Constituent Assembly, the ill-effect of this authorization was pointed out to the president by a number of members of the House. As S. L. Saksena said, "if the power is given to the President to abrogate this right, it will be a slur on our Constitution . . ."<sup>92</sup> It may be noted here that we do not

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<sup>91</sup>C.A.D., Vol. IX, p. 539.

<sup>92</sup>Ibid., p. 541.

find any mention of such tremendous power to any head of State in any country including the United States, Canada, Australia and England. It was said about Article 359 which provides right to the president to suspend Article 19, "as an autocratic negation of liberty."<sup>93</sup> "This article," says Mr. Kamath, "takes the palm over all other Constitutions in the world . . . A general authorisation of this kind for restricting individual freedom has no parallel anywhere else."<sup>94</sup>

#### CAN THE PRESIDENT OF THE UNITED STATES BECOME A DICTATOR?

If we examine the workings of the office of the American presidency in recent years, we may find some seeds of dictatorship in the making. Although these seeds have not got a good supply of water from the Constitution to grow yet, they have enough authoritarian flavor in them. The most important factors that may go to make the President of the United States a dictator, it is said, is its ability to command a vast range of power--a range which is developing every day. It is assumed that a president with a pliant Congress can assume dictatorial authority and command immense power in the United States.

The so-called path towards dictatorship of presidency is being marked by the increasing dependence of people on the actions and policies of the White House. Workers look to the president for emoluments of wages, farmers for fixation of prices, businessmen for loans to start new enterprises or protection or expansion of existing ones. Old people, widows and orphans see in the presidency the image of a philanthropic institution. The presidency

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<sup>93</sup>C.A.D., Vol. IX, p. 541.

<sup>94</sup>Ibid., p. 533.

appears all the more imposing because it is the center of expectations. Just as he is to the Sioux Indians, the president is in a sense the Great Father to the American people. They look to him because he has unlimited power to make proposals for action. He can espouse any cause and whatever he says will be heard and noticed.<sup>95</sup> The appearance of presidential power is enhanced by the color and pageantry of the office, the adoption to American needs of the monarchial principle. The president reigns as well as rules.<sup>96</sup>

The critics of the office of presidency point out that the real opportunity for eventual dictatorship in the United States may be found in the steadily increasing centralization of power in Washington. These critics observe that until the 1930's, the power of government in Washington was strictly a limited power. The great reservoir of power lay in individual states. Until that time too, the power of the purse, as that power was exercised by Washington, was limited. Federal aid to states was generally limited to road building, river and harbor development, land-grant colleges and a few irrigation projects. But, today, the circumstances have changed and the states are depending on the Federal Government for aid and assistance in a host of functions. "The President, in short, is the one-man distillation of the American people . . ."<sup>97</sup> which may encourage the man in office to assume enormous power and command all sorts of authority.

But criticism put forward doesn't hold any ground in reality. The American president is checked by the opinion of the people in general or when they organize, by their pressure groups. The president gets his way by begging for help.

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<sup>95</sup>Louis W. Koenig, The Chief Executive (New York: Harcourt, Brace & World, Inc., 1964), p. 6.

<sup>96</sup>Ibid.

<sup>97</sup>Clinton Rossiter, The American Presidency (New York: Harcourt, Brace & Company, 1956), p. 5.

The states are increasing their participation in and contribution to domestic programs faster than the central government. From an economic point of view also during the past ten years, the central government has lost its superior influence. Thus, we can say that the President of the United States, like the President of India, is not likely to become a dictator other than by total war and/or abrogation of the Constitution.

#### INABILITY OF THE INDIAN PRESIDENT TO BECOME A DICTATOR

All these fears, both about the Indian and the United States presidents, are serious in nature and spirit. Nevertheless, looking back and examining the record carefully, one may feel that these fears are the result of an overcritical study of the presidency. The role of the President of India can be understood if we carefully read the debates of the Constituent Assembly on this subject. The severe attack made on the floor of the Constituent Assembly and the dangerous results of the emergency power have now lost their strength and value to a great extent after the working of the constitution for fifteen years. The main fear over these powers of the president is that he would destroy the federal character of the Union, take over all powers of the Union and States in his hand, and behave like an autocrat; this assumption of power will make the philosophy of freedom a mere farce and democratic principle a nightmare.

To reach a conclusion of this topic we have to examine the strength of fears hovering in the minds of students of the Indian Constitution. This is a truth that the president during the operation of emergency might be able

to transform the federal nature of the polity into a unitary one, but this is not a peculiar right that he alone commands in the world. This right, in one way or another, is being commanded by almost all the heads of States under federal constitutions. For the maintenance of national security and safety of the people, the Constitution has provided this power to the president. Thus, the presidential authority to take over the administration of the whole Indian republic is a result of abundant caution. As Mr. Ambedkar, the then Law Minister said:

. . . For it is only the Centre which can work for a common purpose and for general interests of the country as a whole. Herein lies the justification for giving to the Centre certain overriding powers to be used in an emergency. And after all, what is the obligation imposed upon the constituent states by these emergency powers? No more than this, that in an emergency, they should take into consideration along side their own local interests, the opinion and interests of the nation as a whole.<sup>98</sup>

Students of Indian history know that India had to suffer in the past because of weak central authority unable to face unexpected aggression and revolt of States against the Centre. The present day history also speaks that there exists many disruptive forces which may go to destroy national unity and endanger public peace and security. This historical background and present day need necessitates a strong executive who could be able to handle any situation and save unity of nation even at the cost of destroying the federal feature temporarily. This provision in the Constitution, in the opinion of many, is the need of time and practical in approach. It does not make the president a potential destroyer of federalism, rather it empowers him to face grave situations with boldness and a strong hand. During the

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<sup>98</sup> C.A.D., Vol. VII, p. 42.

the debate in the Constituent Assembly, this point was made clear by Mr. Naziruddin Ahmed in these words:

This is the most important provision in the Constitution. . . I submit that we must take not a theoretical view of the affair, but rather a practical view. I submit that there are real dangers threatening the internal peace of the country, apart from the fear of external aggression . . . There are many dangers lurking in the way of the establishment and maintenance of democracy in this country. There are forces of disintegration and disorder already visible everywhere.<sup>99</sup>

Mr. Ambedkar frankly admitted on the floor of the Constituent Assembly that the articles of emergency powers of the president should never be called into operation and the nature of federation should all the time come, be maintained and preserved.<sup>100</sup> But to Mr. Krishnamachari, the present Finance Minister of India, it appears that "these emergency provisions have got to be tolerated as a necessary evil and without these provisions, it is well nigh possible that all our efforts to frame a Constitution may ultimately be jeopardised."<sup>101</sup>

As to the problem of the President of India becoming a dictator, we have to examine the limitations--both legal and moral--of this office in detail. Those who find in the provisions of the Constitution a very comfortable position for the president to change from constitutional head to real head, have to take certain facts into consideration. Though it may appear that the Constitution of India provides an American type of presidential government, in reality, it is a British-Parliamentary type of

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<sup>99</sup> C.A.D., Vol. IX, p. 116.

<sup>100</sup> Ibid., p. 177.

<sup>101</sup> Ibid., p. 125.

constitution.<sup>102</sup> Like the Crown of British Constitution, the president is a nominal head of the administration. He is the head of the State and the ceremonial chief who will behave like the Crown under the British system of government, in exercising the powers conferred upon him by the constitution. His position and function would be the same as those of the British King who acts on the advice of his cabinet. It is India's dislike and disapproval of a Monarchy that led to the provision of an elected president instead of an hereditary King. The main reason of his unlimited grant of constitutional power depends on the dictum that he will not use them to destroy the edifice of democracy. He will lead the nation and guide the ministry in time of crisis with the powers he is entitled to use as being the head of the State.

An objective assessment of the evidence is persuasive that the chances of the president becoming a Hitler, a Caesar, or a Tsar are almost nil. Even if he decides to become an autocrat, by declaring an emergency and even acting without the ministry, it seems impossible for him to carry on the administration without the sanction of the Parliament. He can not run the government without money and the right to appropriate funds lies under the area of Parliament's authority. There is no provision in the Constitution that can give authority to the president to appropriate money without Parliament's

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<sup>102</sup>  
G. R. Iyengar, The New Indian Constitution (Tiruchirapalli: Tutorial Law College, 1957), p. 142.



approval. Hence, we find that the president, if he chooses to be an autocrat, may carry his rule, at the most, through the current financial year; to run the administration any further would need Parliamentary support in the form of financial appropriations. This means that the president is very much handicapped by the powers of Parliament, and this should dispel fear that the president can ever assume the role of a dictator. There can hardly be an occasion when he can administer and rule the country without the advice of a Council of Ministers. To imagine that the president and the cabinet would combine together to flout the Constitution by maintaining a perpetual emergency and dissolving the House of People everytime it comes into being or extending the life of an existing favorable Parliament, is only a fear born out of mistrust and misconception of democracy itself.<sup>103</sup>

The truth that the president would head the State as a titular head has been accepted during the debates in the Constituent Assembly. Emphasizing this fact, Mr. Alladi said:

The President means the Central Cabinet responsible to Parliament in which are representatives from various units which form the component parts of the Federal government. Therefore, the provincial machinery having failed, the Central Cabinet assumes the responsibility instead of the Provincial Cabinet.<sup>104</sup>

The president's right to suspend the fundamental rights of the people has evoked great suspicion in the design of the Constitution itself. In the United States, the power is vested in the Congress. The American president has an ad interim power to suspend fundamental rights, but the Supreme Court

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<sup>103</sup> Pylee, op. cit., p. 591.

<sup>104</sup> C.A.D., Vol. IX, p. 124.

can declare presidential and congressional action void if it feels that it is unjustified under the circumstances. In Britain, the British Emergency Power Act, 1920, clearly says that an emergency proclamation must be laid down before Parliament within five days of its issue and would cease to operate after seven days if Parliament does not approve of it.<sup>105</sup>

The conflicting opinions which figured in the Constituent Assembly on this authority of the president could not be reconciled. In the interest of the safety of the nation, the constitution-makers provided this right to the president. Mr. Alladi Krishnaswamy Aiyer pointed out in the Constituent Assembly that:

A war can't be fought on the principle of the Magna Carta. Freedom of speech, right of assembly and other rights have to be secured in times of peace, but if only the State exists and if the security of the State is guaranteed. Otherwise, all these rights cannot exist.<sup>106</sup>

The provision for the suspension of constitutional rights does not mean that all the fundamental rights would cease to exist automatically, with a mere proclamation of emergency. There may be an emergency in the country and the president may not like to suspend the fundamental rights of the people. Even if the president decides to suspend the fundamental rights of citizens, his orders must be placed before the Parliament which is free to approve or disapprove it.

#### THE PARLIAMENT--A GREAT CHECK ON THE PRESIDENT

Thus, we see that in India the scope for the president to become a

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<sup>105</sup>Pylee, op. cit., p. 593.

<sup>106</sup>C.A.D., Vol. IX, p. 545.

dictator by use of emergency powers appears to be limited and dim. The Parliament, with its vast range of power, is capable to frustrate any move of the president to rise as a dictator. The Cabinet that commands majority role in the Parliament-Lower House will also exercise its influence to check an ambitious president to grow powerful. The Indian President, unlike the American President, is free from judicial review of his decision regarding the use of emergency powers, yet he is under the pressure of public opinion and moral obligation to protect the Constitution both in form and spirit.

In short, we can say that during a period of emergency, the executive becomes unusually powerful in any form of government--federal or unitary. The powers of the American President, the chief executive of a supposedly weak federation, during the two world wars were enormous. This is in spite of the fact that there exists in the United States in practice the doctrine of separation of powers. In contrast, there is in India a parliamentary system in which the executive, because of its command over the legislature, becomes both the chief legislator and the chief executive. But this does not mean that the Parliament becomes a slave in the hands of the executive, rather it behaves as a vigilant and conscious power to control executive from becoming an autocrat. Emergency powers granted to the president do not mean that he is above the Parliament. As Mr. T. T. Krishnamachari points out:

The Parliament has always the right to call the Executive to order; and if they find that the Executive had exceeded their powers in regards to the operation of any of the provisions enacted under the emergency laws, they can always pull them up.<sup>107</sup>

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<sup>107</sup>C.A.D., Vol. IX, p. 126.

It may be said that the president may dissolve the House of People and make it incapable of discussing the emergency measures, but such action can almost put off the discussion to a maximum of six to eight months. Even if the House is dissolved, the proclamation of emergency will have to be laid before the Council of States--the representatives of the States--within two months and if the Council does not approve, the proclamation becomes invalid.<sup>108</sup> This indeed is an effective check on any president bent upon creating an imaginary emergency and becoming a dictator. In this case, we may say that "it is not correct to compare the emergency provisions with either Section 102 or Section 103 of the Government of India Act, 1953. The President, acting under a democratic constitution, can not be compared with the Governor-General acting under British rule."<sup>109</sup> The Governor-General under the Government of India Act, 1935, was also empowered to proclaim emergency in case the security of India was endangered and could ". . . make laws for a Province or any part thereof, with respect to any of the matters enumerated in the Provincial Legislative List . . ."<sup>110</sup>

## CHAPTER V

### CONCLUSION

In conclusion, we feel that the emergency provisions in the Indian Constitution have given to the president a powerful weapon by which he can

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<sup>108</sup> Pylee, op. cit., p. 159.

<sup>109</sup> Ibid., pp. 591-592.

<sup>110</sup> Government of India Act, 1935, Section 102 (1)(3).

either protect or destroy the elements of democracy in the Constitution. Although we have found in research that the president can not succeed in becoming a constitutional dictator, yet it can not be denied that there is a chance of his gaining power through these provisions. Mr. B. N. Rau asserts that the president has not been put under any legal obligation to adhere to the advice of his ministers.<sup>111</sup> This forces us to inquire whether it was necessary to put the provisions of emergency powers in the Constitution.

IS THERE ANY NEED FOR INCORPORATION OF EMERGENCY POWERS  
IN THE WRITTEN CONSTITUTION OF A STATE?

The need for constitutional incorporation of emergency powers of the head of the State has become urgent in the past few years. The working of constitutions of the United States, Canada, Australia, England and some other western democratic countries has given strength to the idea of putting down in clear terms the powers of the head of the executive, especially during abnormal times. In England, which has an unwritten constitution, we find various parliamentary enactments (i.e., Emergency Powers Act 1920, the Defense of Realm Act 1939) giving wide powers to the executive to meet national emergencies. In the Constitution of Canada<sup>112</sup> there appears a

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<sup>111</sup>B. N. Rau, India's Constitution in the Making, edited by B. Shiva Rao. Bombay, 1960. Selections from the papers of a distinguished Indian who was Constitutional Adviser to the Constituent Assembly through all the stages of the drafting of the Indian Constitution.

<sup>112</sup>Section 91, The British North American Act.

clear grant of authority to the executive for maintenance of "peace, order and good government" during the time of crisis. The Dominion Parliament under the Canadian Constitution gets power to legislate for the whole of Canada. In the Commonwealth of Australia Act there is a grant of powers to the federal executive to protect every State against invasion or against domestic violence.<sup>113</sup> Although there is no similar specific emergency provision in the Constitution of the United States, yet the Congress can grant the executive power to meet any challenge and to face any emergency.

This shows that there is a tendency at least in modern governments to provide the executive with enough power to deal with any abnormal situation arising out of aggression or internal disturbance of any nature. In modern times the abnormalities of political situations and the need to deal with them go together. Due to international bickerings, internal group dissatisfaction, racial, language, religious and economic problems, the administration of all modern countries has become extraordinarily complex.

To save the nation from any unforeseen calamity and administrative collapse, due to a sudden change of situation or a reversal of fortunes, there should be a final authority vested in some key official. The executive is the most appropriate office for this. It is a fact that this authority in the hands of the executive may provide an opportunity for him to ignore the principle of separation of powers and to exercise his discretion rather freely. But one can not ignore the practical aspect of the incorporation of emergency powers in modern times, when a nation's political stability is always in danger. Particularly in the new nations of Asia and

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<sup>113</sup>Section 51, The Commonwealth of Australia Act.

Africa, which are exposed to many new problems--political, social, economic-- it is most necessary to put everything in the constitution in clear terms to avoid ambiguity and confusion. This will minimize the chance of delayed action by the authorities vested with such powers. A written constitution is, after all, designed to prescribe in unambiguous language the powers and functions of different offices so as to reduce the chances of conflict between them.

Dr. Ambedkar was an outstanding advocate of incorporation of emergency powers in a written constitution and confidently recommended its inclusion. While introducing the emergency provision in the Constituent Assembly, Dr. Ambedkar said:

. . . The reason for its inclusion in our Constitution is that in the U.S.A., such legislation was challenged and declared unconstitutional by the Supreme Court with the result that after such declaration by the Court, the President could hardly do anything which he wanted to do under the provisions of the National Recovery Act. A similar fate perhaps might overwhelm our President if he were to grapple with a similar financial and economic emergency. In order to prevent such difficulty, we thought it was much better to make an express provision in the Constitution itself and that is the reason why this article has been brought forth.<sup>114</sup>

#### HAVE EMERGENCY POWERS BEEN USED WITH CAUTION OR CARELESSLY?

To answer this question may require a background history of the office of the presidency in modern times. The vagueness of some constitutional grants of power to the president has always furnished matter for comment,

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C.A.D., Vol. X, p. 361.

sometimes favorable, sometimes otherwise, depending on the commentator's bias.<sup>115</sup> In American constitutional history, use of this power has many times been upheld by the Supreme Court. On several occasions it has been declared void, but this does not mean that these powers, when granted by the Congress, have been used carelessly and without any aim in mind. For example, in 1942, when the Congress and the president were in agreement that the Japanese-Americans were a threat to the security of the nation, the president was using his powers with a definite objective in mind--to protect the sovereignty and units of the country. In the *Koremantsu Case*,<sup>116</sup> the Supreme Court accepted the president's definition of emergency and endorsed the executive's act. This means that the president in the United States has tried to use his authorities to achieve some public good and also with caution. Although in the *Steel Seizure Case*, the Supreme Court opined that the president's ground for using his war power was not justified, yet, it may be said that "the President, in the U.S.A., can on the basis of his inherent power seize an industry if an emergency exists, and an emergency exists if the President is successful in his exercise of his prerogative."<sup>117</sup> In more than a hundred years of history, it has never been established that any American president has ever used the war power to gain dictatorial position. As a matter of fact, there has not been a single instance of a president actually taking prerogative action in a crisis against the wishes of Congress, with the exception of the seizure of the steel industry.<sup>118</sup>

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<sup>115</sup>Edward S. Corwin, The President: Office and Powers, 1787-1737 (New York: New York University Press, Inc., 1957), p. 306.

<sup>116</sup>Koremantsu v. U.S., (1944) 320 U.S., 214.

<sup>117</sup>Johnson, op. cit., p. 349.

<sup>118</sup>Ibid., p. 351.



The Indian President, with a short constitutional history of just over fifteen years, has evoked the emergency provisions more than once. The reasons have been political instability of the Ministry in one of the States or external aggression. Most frequently the president has used his authority on the report of the governor. The reports of the governor satisfied the president of the need of proclamation of emergency. The president's acts in some cases have been criticized by political thinkers, especially by opposition leaders. The president's proclamation of emergency in Andhra was criticized on the ground that it was the duty of the governor to call upon the opposition party leader to form a government and that a resort to presidential rule would have been justified only if an alternative government was impossible. But the presidential rule in Andhra can be defended on the grounds that there was no party in the State which could claim a majority and a coalition between two different ideological groups would not be a good idea and also a general election was due in three months. The situation supported the president's position that an impartial administration was needed for the benefit of the State.<sup>119</sup> On another occasion, the genuineness of the president's action in using his emergency powers to rescue a State from constitutional breakdown, aroused doubts in the public mind. The occasion was dismissal of Kerala's Communist Ministry which had a majority in State Legislature, and the president took over the administration. But this act of the president was not rash or without an end in view. The report of the governor revealed to the president that the government had lost the support of the majority of the people of the State.

Thus, it can be very safely said, that the president both in the United

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<sup>119</sup>Rajya Sabha Debates, d. 29-11-59.

States and in India, have used their powers--explicit and implied--for the maintenance of law and order and promotion of the common good. There has never been an occasion in India when the president has taken recourse to the emergency provisions to enlarge his range of influence or power. All of his decisions to proclaim emergency were based on the advice of the Prime Minister.

#### HAS THIS POWER BROUGHT ANY EFFECTIVE CHANGES IN THE OFFICE?

The words of Corwin, "Taken by and large, the history of the Presidency has been a history of aggrandizement,"<sup>120</sup> reflect the growing change in the nature of the office in the United States in recent years. But these words of Corwin can equally be applied to the Indian Presidency also.

During the past few years there has been a tremendous change in the dimensions of this office.

The great accession to Presidential power in recent decades has, however, taken place in the internal equally with the external field of government, and has been signalized by the breakdown of the two great structural principles of the American Constitutional System, the doctrine of dual federalism and the doctrine of the Separation of Powers. . . The replacement of the laissez-faire theory of government with the idea that government should make itself an active, reforming office in the field of economic enterprise . . . has long since come to transcend State lines.<sup>121</sup>

The Congress has also contributed to this rapid change by entrusting to the president powers which traditionally the Congress itself had exercised.

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<sup>120</sup>Edward C. Corwin, Constitutional Revolution, Ltd. (Claremont, California: Claremont Colleges, 1941), p. 306.

<sup>121</sup>Ibid., pp. 306 & 313.

But it can be said that the American President faces a hard problem in translating his will into action. This is mainly because of his lack of actual control over bureaucracy. The Indian President, on the contrary, has no such problem and can govern the nation through a Ministry responsible to the Parliament and a permanent civil service in case of emergency. Though there is an experienced civil service to execute the orders of the president, yet the president has not been allowed to have direct communication with the head of the various departments of administration.<sup>122</sup> The Indian Presidency has also not been able to acquire enough ground to show his authority as the supreme commander in chief.

But the Indian Presidency has clearly exerted itself in upholding its voice in matters of public concern. During the fifteen years of its life, the Indian Presidency, on many occasions, has differed with the Prime Minister's office.<sup>123</sup> The President of India had also exercised his power of veto in respect of the Patiala and East Punjab State Union Appropriation Bill, passed by the Parliament in 1954.<sup>124</sup> These differences of opinion between the president and the ministry and the acceptance of the president's wishes go to show that this office is not a true copy of the British Crown-- it has some distinguishing features.<sup>125</sup>

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<sup>122</sup>B. A. V. Sharma and N. M. Valecha, "The Indian President," Political Quarterly, Vol. 33 (January-March, 1962), pp. 64-65.

<sup>123</sup>Ibid., p. 65

<sup>124</sup>Ibid.

<sup>125</sup>Ibid., p. 66

## THE FUTURE OF INDIAN PRESIDENCY

Until recently, the history of the presidency in India is the history of one man in office. The second president, Dr. S. Radhakrishnam, is now serving in his first term. The first president, Dr. Rajendra Prasad, was one of the makers of modern India and was the President of the Constituent Assembly which framed the Constitution of India--the fundamental laws of the nation.

President Rajendra Prasad's faith in the parliamentary system and his desire to adhere to the principles of the British Constitution gave a smooth sailing to the Indian administrative setup. The present president, with a strong Prime Minister to aid and advise him, is also going along with the doctrine of Cabinet Government. But there are possibilities of a change of situations--political, social, economic and cultural--in the future because of the rise of strong opposition parties and a change in the outlook of the people.

In that case, it may be said, the president in the future will not be an impartial constitutional head of the State like the British Crown. Rather he will be the leader of the political party he represents and will act in a partisan manner much as the President of the United States does. It may not be ruled out that if, at the federal government level, no single party gets a majority in Parliament to form a Ministry, the position of the president will become more powerful and influential. He may exploit the situation to take over powers in his hands by appointing a man of his choice as Prime Minister.

But such a situation as that suggested above may not come to pass in the foreseeable future. By the time the Indian States get different parties to compete for control of the administration, and multiple parties at the center to compete for control in Parliament, there should be some well-established conventions to guide the president and a very strong public opinion to work as a check on the president's personal ambitions.

It is very difficult to predict the future of the presidency in India with confidence, yet one can be sure of the fact that the office is being shaped in the British pattern at present.

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N.C.S.

Manhattan, Kansas

August 20, 1965.

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APPENDIX

APPENDIX

ARTICLES OF THE CONSTITUTION OF INDIA

Article 19:

- (1) All citizens shall have the right--
- (a) to freedom of speech and expression;
  - (b) to assemble peaceably and without arms;
  - (c) to form associations or unions;
  - (d) to move freely throughout the territory of India;
  - (e) to reside and settle in any part of the territory of India;
  - (f) to acquire, hold and dispose of property; and
  - (g) to practise any profession, or to carry on any occupation, trade or business.
- (2) Nothing in subclause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
- (3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
- (4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
- (5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.
- (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, prevent the State from making any law relating to,--
- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
  - (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.



Article 20 (3):

(3) No person accused of any offense shall be compelled to be a witness against himself.

Article 22 (4)-(7):

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless--

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe--

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Article 23 (1):

(1) Traffic in human beings and and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Article 83:

(1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

Article 207:

(1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of Article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council:

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of a State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill.

Article 256:

The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

Article 352:

(1) If the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by

Proclamation, make a declaration to that effect.

(2) A Proclamation issued under clause (1)--

- (a) may be revoked by a subsequent Proclamation;
- (b) shall be laid before each House of Parliament;
- (c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolution of both Houses of Parliament;

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

#### Article 353:

While a Proclamation of Emergency is in operation, then--

- (a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;
- (b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

#### Article 354:

(1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

(2) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

Article 356:

(1) If the President, on receipt of a report from the Governor or Rajpramukh of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation--

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or Rajpramukh, as the case may be, or any body or authority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions as appear to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People take place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but not resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3):

Provided that if and so often as a resolution approving the continuance in the force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its constitution unless before the expiration of said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

Article 358:

While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Article 359:

(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

Article 365:

Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.

Article 368:

An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when

the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, The Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in--

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

#### EMERGENCY ORDERS IN THE CONSTITUTION OF INDIA

##### S.R.O. 925:

Whereas I, Rajendra Prasad, President of India, have received a report from the Governor of the State of Punjab and am satisfied that a situation has arisen in which the Government of that State cannot be carried on in accordance with the provisions of the Constitution of India;

Now, therefore, in exercise of the powers conferred by Art. 356 . . . . and of all other powers enabling me in that behalf, I hereby--

(a) assume to myself as President of India all functions of the Government of the said State and all powers vested in or exercisable by the Governor of that State;

(b) declare that the powers of the Legislature of the said State shall be exercisable by or under the authority of Parliament; and

(c) make the following incidental and consequential provisions which appear to me to be necessary or desirable for giving effect to the objects of this Proclamation, namely:--

(i) in the exercise of the functions and powers assumed to himself by virtue of clause (a) of this Proclamation, it shall be lawful for the President to act to such extent as he thinks fit through the Governor of the said State;

(ii) the operation of the following provisions of the Constitution in relation to that State is hereby suspended, namely:--

so much of clause (2) of Article 151 as relates to the laying of reports before the Legislature of the State, Articles 163 and 164, clause (3) and (4) of Article 166, Articles 167 and 169,

Articles 174 to 186 (both inclusive), clause (3) of Article 187 so far as it requires consultation with the Speaker of the Legislative Assembly, Articles 188 and 189, Articles 193 to 198 (both inclusive), Articles 200 and 201, so much of clause (3) of Article 202 as relates to salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly, Articles 208 to 212 (both inclusive), the provision to clause (1) and the provision to clause (3) of Article 213, so much of clause (2) of Article 323 as relates to the laying of the report with a memorandum before the Legislature of the State, Article 382, Article 384, and paragraphs 6 and 8 of the Second Schedule;

(iii) while this Proclamation is in force, it shall, notwithstanding anything in any law relating to elections, be unnecessary for an election to be held for the purpose of filling any casual vacancy in the Legislative Assembly of the State;

(iv) any reference in the Constitution to the Governor shall in relation to the said State be construed as a reference to the President, and any reference therein to the Legislature or Legislative Assembly of the State shall, in so far as it relates to the functions and powers thereof, be construed as a reference to Parliament, and in particular, the references in Article 213 to the Governor and to the Legislature or Legislative Assembly of the State shall be construed as references to the President and to Parliament respectively;

Provided that nothing herein shall affect the provisions of Article 153, Articles 155 to 159 (both inclusive), Article 299 and paragraphs 1 to 4 (both inclusive) of the Second Schedule, or prevent the President from acting under sub-clause (i) of this clause to such extent as he thinks fit through the Governor of the said State;

(v) any reference in the Constitution to Acts or laws of, or made by, the Legislature of the State shall be construed as including a reference to Acts or laws made, in exercise of the powers of the Legislature of the State, by Parliament by virtue of this Proclamation, or by the President or other authority referred to in sub-clause (a) of clause (1) of Article 357 of the Constitution, and the Punjab General Clauses Act, 1898 (Punjab Act 1 of 1898) and so much of the General Clauses Act, 1897 (X of 1897), as applies to State laws, shall have effect in relation to any such Act or law as if it were an Act of the Legislature of the State.

S.R.O. 926:

In pursuance of sub-clause (i) of clause (c) of the Proclamation issued on this the 20th day of June, 1951, by the President under Article 356 of the Constitution of India, the President is pleased to direct that all the functions of the Government of the State of Punjab and all the powers vested in or exercisable by the Governor of that State under the Constitution, or under any law in force in that State, which have been assumed by the President by virtue of clause (a) of the said Proclamation, shall, subject to the superintendence, direction and control of the President, be exercised by the Governor of the said State.

EMERGENCY POWERS OF THE INDIAN PRESIDENCY: AN ASPECT  
OF COMPARATIVE CONSTITUTIONAL DEVELOPMENT  
IN THE UNITED STATES AND INDIA

by

NAWIN CHANDRA SINHA

M. A. in Political Science  
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During the past few years the office of the presidency has undergone a tremendous change both in authorities and in influence. The Chief Executive has been a source of many constitutional controversies in democratic countries because of lack of clear conventions and clear mandate by the provisions of the Constitution, particularly the nations of Asia and Africa. In the emerging nations of Asia and Africa the role of the Chief Executive is yet disputed because of the inadequacy of an established pattern of presidential behavior. The presidency in India and the United States has also been a subject matter of great interest to students of political science because of its constitutional powers and prestige. The powers embodied in the constitution of both India and the United States have made this office a source of prestige and honor.

This growing influence of the office of presidency in the United States and India tempted the author to look into the problems of constitutional provisions that go to make this change possible. I have taken up only one aspect of the constitution--the clauses that empower the president to deal with emergencies--both of the United States and India. These provisions--written or unwritten--have given to the office of the president a superiority over other organs of administration. Although the Constitution of the United States does not speak of any emergency powers of the president, incumbents to the office have used them. But in the Constitution of India, there stands a clear authority to the president to meet any emergency. The office of India presidency has hardly seen sixteen years of existence but during this limited number of years, the provisions of the Constitution to declare emergency have been evoked more than six times. This frequency posed a question as to its need and justification. In this research paper I have tried to find out the answers to all such

questions.

The comparative method which I used in this research provided me enough insight to examine the provisions of some major constitutions. But, my main emphasis was to determine the role and scope of the emergency powers of the Indian presidency in the background of the American constitutional experiment. The three questions which I posed regarding the constitutional incorporation of emergency claims, the justification of their use and their effect in bringing about any change in the office have been answered.

The conclusions and answers derived out of this research are that there is need for constitutional incorporation of emergency powers in modern times as the Chief Executive of many emerging nations, with no established convention, may face difficulties in coping with emergencies endangering the safety of the nation. Secondly, the proclamation of emergencies and use of this authority by the President of India seems to be both justified and necessary under the circumstances. The provisions of the emergency powers written in India have brought about some changes in the office of the presidency in India in recent years.