

Centre State Relations in India

Prof. Uday Shankar

Rajiv Gandhi School of Intellectual Property Law

Indian Institute of Technology, Kharagpur

**Week 02: All India Services; Public Service Commission; Administrative Relations during
Emergency**

Lecture 10: Administrative Relations during Emergency

Welcome learners. Now, we have moved to module 3, where we will be discussing all India services, Public Service Commission, administrative relations during emergency. So, we start with administrative relations during emergency and in this we will discuss administrative relations during emergency, historical aspects and what has been debated in the Constituent Assembly with regard to emergency. And then we will discuss Article 352 in today's lecture and then later on in the next lecture we will discuss Article 356 and how the court has responded on the matter of emergency particularly Articles 352 and 356 this is what we will discuss. So, as far as administrative relations during emergency is concerned we need to understand that emergency is a situation where it changes the governance pattern. It foresees a situation where the governance in the State is not carrying on as per the normal situation and therefore, extraordinary interventions are required and it has been suggested that such intervention shall be done by the Central government.

Now, we may we need to understand that this kind of emergency provisions are there in the Constitution for very simple reason that if such extraordinary situation arises, if such emergency situation arises then we need not look for a solution outside the Constitution, solution has to be looked within the Constitution that what Constitution provides for addressing such emergency situation. That is why you would find a good Constitution should always have provisions on dealing with emergency situations or emergency provisions. So, what you find is that even in Government of India Act, there was Part VI of Section 122 to Section 135 which was dealing with

the issue of emergency kind of situation where it was said that the inclusion of emergency provisions is there and those provisions are adequate. Discussions reveal that the framers debated on the nature and extent of increased power of the Centre that what should be the scope and ambit of power of the Central government, the discretionary power of the President and the Governor and what should be the kind of measures to be taken for bringing back the situation to normalcy that is what was a kind of discussion and debate which took place. As we know that there was an attempt made by the British to give a constitutional framework in the year 1909 and 1919 where those constitutional framework was largely presented to safeguard the interest of colonial rulers and therefore powers were vested in the office of the Governor General and the Governors of the provinces and those powers were really very broad and it was power of a nature compromising the democratic values where powers were given to the Governor General and Governors to directly intervene in the situations of emergency.

One may say that 1935 Act was an improvised version of 1909 and 1919 constitutional scheme where it was suggested that there should be a constitutional autonomy which should be given with certain constitutional limitations. But there were two issues which 1935 Act brought to our notice. One is the provision to enable the Centre to control the provinces during emergencies and to make provisions for carrying on the administration is the machinery for the ministerial government if they fail to function as per the 1935 scheme. So, when you look at historical aspects that how this emergency has been dealt under 1935 Act you would find that it has answered these two important questions in this way – Section 102 provided that the Federal Legislature has got the power to legislate for all the matters in the event of security of India is threatened by war or internal disturbances. So, Section 102 in a way unifies the governance and confers the power of the State Legislature upon the Federal Legislature. Further it says that the provincial autonomy as envisaged would be subordinate to the requirements of emergency situation. So, what kind of the federal system which was brought in through 1935 Act it said that if emergency comes in that autonomy that federal scheme has to be kept aside for the time being unless and until the situation comes back to normalcy. The Act has also provided that Governor General and Governor has to deal with the situation when there is a failure or breakdown of constitutional machinery. So, there is something which is similar to what we see now which is there in the Constitution even now where power has been given to the Governor to submit a report as we have studied in lecture 8. If the

Governor finds that there is a breakdown of the constitutional machinery, Governor can submit the report to the to the Central. So, Governor could assume all the powers of the Ministry and the Provincial Legislature if such emergency situation comes in. Now under the Constitution of India of 1950 emergency provisions are dealt in a very elaborative way. There are three kind of emergencies which are being discussed the Article 352 is one emergency which has been discussed second is Article 356 and the third one is Article 360.

There are three categories of emergencies which are being discussed. Article 352 largely deals with the emergency which are there where the very security of the State is under threat where there is a kind of war like situation or there is attack on sovereignty of the country. So, proclamation of emergency as it is envisaged under Article 352 it says that if there is a security of India is under threat or any part of the territory by war or external aggression or armed rebellion then in such external aggression or armed rebellion then in such a situation emergency can be proclaimed. Article 353 provides for the effect of proclamation of emergency where the executive power of the Union shall extend to the giving of directions to any State and power of Parliament to make laws on any matter. Article 355 talks about responsibility of the Union to protect the States against external aggression and internal disturbances and Article 356 talks about failure of constitutional machinery in the States and the power of the Union government to intervene. We will discuss Article 355 and Article 356 in the next lecture this lecture we will confine only to Article 352.

Now when you look at the making of the emergency provisions the Constituent Assembly discussed about the emergency provisions. The responsibility was given to the Union Constitution Committee that proposed that President should not have any special power to act independently because we have followed a parliamentary democracy the responsibility was given that let the elected representative we have a responsibility of deciding on what are the measures to be taken to contain the situation of emergency. So, Provincial Constitution Committee suggested that the Governor should have the emergency power to send a report to the President if there is a grave menace to the peace and tranquility and that is how you find the Draft Article 275 which is currently Article 352 was it was debated on August 2, 1949 whereas Article 356 was debated on August 3, 1949. What was debated in relation to Article 352? You find that Dr. Ambedkar has proposed to change war or domestic violence with the phrase war or external aggression, or internal disturbance so that it is only a situation of grave nature where such kind of power is to be invoked

because we need to understand that when we talk about emergency the situation must be such where the realignment rearrangement of federal system has to be justified and it should not be done simply on a very flimsy reason or on a very lighter grounds.

Mr. Kamath also argued that the word war has a grave effect where emergency can be proclaimed even if there is no formal declaration of war. So, in a way it was left on the decision of the government that even if there is a no waging of war done even if there is a no situation of kind of direct confrontation but still if the government believes that situation has arisen where some kind of direct control is required to be taken of the territory of State government or the territory then it should be done. Then the members have also suggested that let this not be a decision of the President, President should act upon the advice of the Council of Minister. It was suggested by one of the members Mr. Brajeshwar Prasad that the words like war external aggression they should be deleted as these all words are not exhaustive and they are not covering every situation of emergency. The members were also of the opinion that proclamation should not be led on before the Parliament because say that President is a better person to judge the situation and act accordingly. Now when you look at how the provision has been structured has been given a shape under the 1950 Constitution. Article 352 says that if the President is satisfied and satisfied here does not mean the subjective satisfaction of the President it means the satisfaction of the Council of Ministers that a grave emergency exists whereby the security of India or any part thereof is threatened whether by war or external aggression or armed rebellion the President may by proclamation make a declaration to that effect.

Article 352(1) thus categorically says that proclamation did not be extended to the entire country. It can be very much restricted to a part of the country and a proclamation which is issued under Article 352 may be valid or revoked by a subsequent proclamation. So, there is a possibility of coming up with a different proclamation or revoking the proclamation under Article 352(2) that is what is also possible and this is what one should say is the uniqueness of the Indian Constitution where the Constitution talks about the situations in which emergency is to be invoked and at the same time it also suggests that when the emergency is to be revoked. So, Constitution provides a mechanism for addressing the situation of emergency and how to tackle that and also suggest that if situation returns back to normalcy, then the emergency should be revoked. We know very well that in 1975 emergency was invoked under Article 352 and which was protested and heavily

criticized. Therefore, there was an amendment done under Article 352(3) and what was suggested is that any emergency imposed under Article 352 it must be communicated to the President in writing. So 44th constitutional amendment has brought in this change under Article 352(3) and it says that President shall not issue emergency under Article 352(1) or cannot vary such proclamation unless the decision of the Union Cabinet is been given to him in writing.

So, an attempt was made through 44th constitutional amendment where a kind of collective decision making was made a matter of decision making for the President that cabinet has considered the situation and collectively decided to invoke Article 352(1). Additionally, it has also been done that the word armed rebellion was substituted for internal disturbance because it was suggested that internal disturbance is becoming too loose terminology for invoking proclamation of emergency for the Central government and therefore it was suggested that let there be a situation of armed rebellion for excising power under Article 352 and not internal disturbance. As I said that the significance of discussing provisions on emergency under the Constitution is also to lay down the measures which is required to be followed for containing the kind of power of the Centre and making all attempts to see that the power which has been entrusted during emergency upon the Centre is not prolonged for unreasonable duration. That is why this laying down of proclamation on the floor of the House becomes very important because in parliamentary democracy it is the elected representative we shall decide on the course of action and not the office of the President alone. So, Article 352(4) says that such proclamation has to be laid down on the floor of the House and it says that proclamation shall cease to be an operation on the expiry of one month unless it has been approved by resolutions of both Houses of Parliament. So, you may see here that the approval is to be taken from the Parliament and to me it is a very significant provision where it has been said that if emergency situation has come then it must get an approval from the elected representative in order to get legitimacy of such decision imposed by the Central government on a part of the territory or on the entire country. So, the purpose is that Parliament must be convened within a month time to consider that whether the decision taken by the Central government is appropriate or not, whether it is proportionate or not. A proclamation will automatically cease after one month if it is not approved by the Parliament in the meantime. Earlier this duration of proclamation was of two months through 44th amendment Act it was reduced to one month time.

Then Article 352(2) also says that if Rajya Sabha approves it that is also good enough reason for revoking the proclamation. It says that if at the time of issue of the proclamation or thereafter if Lok Sabha is dissolved without approving the proclamation and Rajya Sabha approves it then the proclamation ceases to operate 30 days after the Lok Sabha sits again after fresh election unless in the meantime new Lok Sabha passes the resolution approving the proclamation. So, situation where Article 352(4) deals with that it has to be approved by the Parliament and when the proposal has gone to the Parliament and at the time Lok Sabha is not in the session or dissolved then Rajya Sabha's approval is fine for continuing the proclamation. As soon as Lok Sabha gets convened, Lok Sabha comes into session then it has to be placed before Lok Sabha for considering the proclamation and for approving the proclamation of emergency. So another important safeguard introduced through 44th constitutional amendment act is that lay down that a resolution approving the proclamation of emergency has to be passed by each House with a special majority. It says by a majority of total membership of each House and not less than two thirds of the majority of the members present and voting in each House. So, the constitutional amendment has introduced safeguards to minimize the misuse of provisions of Article 352. One may say that the safeguards are being introduced after learning the lessons when emergency was proclaimed in the year 1975 on the ground of internal disturbance. Once approved by the Parliament, proclamation remains in force for six months unless it is revoked earlier. Revocation again is the responsibility of the Parliament. For continuation of emergency beyond that period again one has to go back to the Parliament to seek the approval. So, each time there has to be a kind of approval by the Parliament and its life can be extended for six months.

Again, this is been added through 44th constitutional amendment and previously there was no provision for periodical parliamentary review of the need for continuance of emergency. Another safeguard was introduced in 1978 through 44th constitutional amendment where it says that the President is obliged to revoke a proclamation of emergency once it is issued under Article 352 if the House of People pass a resolution disapproving the same. So, if Lok Sabha passes a resolution disapproving the same then emergency must be revoked. So, you can see here that the kind of strength the kind of power positioning entrusted upon the elected representative on the matter of emergency and it says that for passing such a resolution simple majority is required. When you distinguish it from the continuation of emergency, for continuation of emergency special majority

is required for passing the resolution, for revoking it says that simple majority is required. Prior to this 44th constitutional amendment Act the power to revoke the proclamation was vested in the Executive and the House had no say in this matter.

Another safeguard which was added and all these were learnings one may say from 1975 act of the then government of invoking national emergency. It says that if a notice comes from no less than one tenth of the total members of Lok Sabha of their intention to move a resolution disapproving the proclamation of emergency and if the notice goes to the Speaker of the House if the House is in session or the President if the House is not in session then a special seating has to be called within the 14 days from the date on which such notice is received by the Speaker or the President as the case may be for considering such resolution. It does not lie within the power of the government to convene or not to convene a session of the House to consider resolution in question is something which is a direct mandate under the Constitution. So, you can very well look at it that all the safeguards are introduced so that abuse of power given under Article 352 should not be there because as we know that emergency converts the very nature of the Constitution. It makes a from federal to unitary Constitution. It is the Centre which starts governing the States unilaterally and the State Assembly gets dissolved, State government gets dismissed. Article 352(9) says that situation may arise where emergency required to be proclaimed on more than one grounds and that is what Constitution allows. It says that President has got a power to issue different proclamation on different grounds. So, the proclamation can be issued on war or external aggression or it can be issued also when there is an imminent danger of war whether or not there is a proclamation already issued under Article 352(1) and such proclamation is already in operation. So, through this it is possible to have more than one proclamation at the same time.

So 38th constitutional amendment which was introduced in 1975 after the proclamation was issued on the ground of internal disturbance there was already existence at the time of proclamation of emergency which was issued because of 1971 war on the ground of external aggression. The provision was to ensure that there should not be any kind of legal hassle on having more than one emergency provisions and it should not become a matter of judicial scrutiny. This is something which has not been disturbed by through constitutional amendment brought in 1978, i.e., 44th constitutional amendment. This provision was written. Now when it comes to justice ability that what the what should be the justice ability though 38th amendment suggested that it added another

Article 352(5) where it was said that the satisfaction of the President has to be final and conclusive and it shall not be brought into any kind of judicial scrutiny. So even the reviewing power of the Supreme Court was barred through this constitutional amendment. Now 44th constitutional amendment changed this position and this Clause (5) was done away with and in fact it has been said that it is well within the power of the judiciary to review the discretion exercised by the President while declaring emergency. It has to be seen that whether such decision has been taken effectively or not.

So 38th constitutional amendment particularly with regard to introducing Article 352(5) was declared as relative of basic structure doctrine. There are few cases where the court has discussed on justice ability of Article 352. For example, Naga People's Movement of Human Rights v. Union of India, where the court has said that the expression internal disturbance has a wider connotation than the armed rebellion in the sense that armed rebellion symbolizes there is a direct threat to the security of the country or part thereof whereas internal disturbance need not pose a direct threat to the security of the State. The magnitude may not be of that nature where there is a threat to the security. Another case of Bhut Nath v. State of West Bengal where the court has refused to hold the continuance of emergency under Article 352 void is stated that the question is a political one and it need not be examined through the judicial process. It should be seen that there are certain matters which is matter of political question and should not become unnecessarily a matter of judicial process. Minerva Mills v. Union of India is another landmark judgment where it has been said that the issue of declaration of emergency cannot be excluded from the scope of judicial review. The court has got a power to see that whether every constitutional functionary exercising the power as per the constitutional provision or not and that is what is the responsibility entrusted upon the judiciary and that is how we need to understand that under the federal Constitution it is the supremacy of the Constitution which is the key feature. The supremacy of the Constitution certainly demands judicial review of declaration of emergency by the Executive. So, what are the consequences of proclamation of emergency? As I said that in the federalism completely gets transformed. The Centre State relationship completely get changed. The legitimacy of two governments arising from the Constitution that Union government and State government that completely gets disappeared during emergency. It is the Union government alone which has got the necessary power to make laws even for the States.

So that is what Article 250 says Parliament becomes empowered to make a law with respect to any matter in the State List and such a law operates till six months after the proclamation ceases to operate. So categorically it says that it is the Parliament which makes a law even on the subject matters which are there for the State to enact the law under List II. Article 359 further provides that even the enforcement of rights which are given in Part III is to be suspended. However, through 44th Constitutional Amendment Act there has been certain important safeguard introduced where it says that that even during emergency the enforcement of rights under Articles 20 and 21 cannot be suspended because Articles 20 and 21, these two are important rights with regard to right to life and to get important protection against the power of the State. For example, Article 20 talks about double jeopardy, ex-post facto law, right against self-incrimination. So, it says that these two rights what is been given under Articles 20 and 21 they are not to be suspended even during the emergency. Further what we find is that Centre has got a power to direct the State and such direction has to be followed by the State in every situation. So, one may say that the executive power of the State is also vested in the Centre and Centre clearly gets the authority to issue necessary executive directions. Since Parliament can make a law even in this exclusive State field it categorically means that the Centre can give even the directions which are on the subject matters which are assigned to the States. Otherwise, we have studied and we have seen that the executive power and the administrative power goes concurrently with the legislative power. But in case during emergency because the law-making power itself gets transferred to the Central government, it is the Central government which gets the necessary executive power to issue the directions.

So, the executive power of the Centre to give directions and the power of Parliament to make laws extend not only to the State in which territory under emergency lies but also to any other State. So, you can very well visualize that how when national emergency is been proclaimed under Article 352, the federal system gets disturbed the federal system completely turns to be a kind of unified system where it is a Centre which gets the authority to rule the State. So, these are the references for this lecture. Thank you very much.