Analysing the state of emergency through international law
A comparative perspective
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1. India, pursuant to constitutional provisions, declared a state of emergency on 25th June, 1975. It was declared on a recommendation from Parliament, by the President, because of prevailing "internal disturbance". It lasted till 1977, when elections were held again. Till then, elections had been suspended.
2. The emergency was declared after, in 1973, the Supreme Court had ruled on the "basic structure" of the constitution doctrine, by which the constitution could not be amended, even by constitutional means. The basic structure included the 1)Supremacy of the constitutional 2) Rule of law 3) The principles of separation of powers 4) The objectives specified in the Preamble to the Constitution 5) Judicial review 6) Articles 32 and 226 (Power of Writ) 7) Federalism 8) Secularism 9) Sovereign, democratic, republican nature 9) Freedom and dignity of the individual 10) Unity and integrity of the Nation 11) The principle of equality, not every feature of equality, but the quintessence of equal justice; (12) The "essence" of other Fundamental Rights in Part III (13) The concept of social and economic justice — to build a Welfare State: Part IV in toto (14) The balance between Fundamental Rights and Directive Principles (15) The Parliamentary system of government (16) The principle of free and fair elections (17) Limitations upon the amending power conferred by Article 368 (18) Independence of the Judiciary (19) Effective access to justice (20) Powers of the Supreme Court under Articles 32, 136, 141, 142 (21) Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act (22) Welfare state. As a response to the ruling, the next day, the Government superseded the three most senior judges of the Supreme Court, and appointed J. A.N. Ray as the Chief Justice of India.
3. After the declaration of the emergency, Parliament promulgated a constitutional amendment, which sought to legitimise the election of Indira Gandhi in 1971, which had been held invalid in Indira Gandhi v. Raj Narain case. Article 329A of the Constitution sought to render the election of the Prime Minister and the Speaker outside the preview of judicial review. The Supreme Court struck down clauses (4) and (5) of the article 329A, which made the existing law inapplicable to the Prime Minister and the Speaker's election, and declared any pending proceeding therein to be null and void.
4. The importance of *Bharti* is important in a situation of conflict, where fundamental rights may be amended in a state of overwhelming majority, or an emergency, by the majority. One of the lawyers arguing was M.K. Nambyar, whose argument was honed by a lecture by Professor Dietrich Conrad, a Professor at Hiedelberg University, who had advanced this argument as questions facing constitutional lawyers in the Weimar Republic – a "discussion, seeming academic at first, but suddenly illustrated by history in a drastic and terrible manner." Perhaps as a consequence, as the constitutional expert A.G. Noorani writes, Article 79(3) of the Basic Law of Germany (1949) – bars explicitly amendments to provisions relating to federal structure, and basic principle laid down in Article 1 and 20 (on human rights and democratic and social set up).
5. The writ of habeas corpus is literally to "produce the body" but has been expanded to find the body, to examine whether any liberty is being restrained. This was done in Indian jurisprudence as far back as 1925. It has also been expanded to include inhuman and cruel treatment meted out to prisoners in jail. The burden to justify arrest is on the detaining authority. In Neelabai Bahera, it covered a custodial death investigation. . Its history is also replete with emergencies.
6. On 1st March, 1969, a royal Party, messenger appeared in the House of Commons to report that a number of persons in London had been arrested for conspiring against the king. He

warned that the conspirators could use habeas corpus as a means of securing their release and continuing their plot. Despite opposition, Parliament followed the king's recommended plan of action. Less than a decade after the passage of the landmark Habeas Corpus Act of 1679, the right to habeas corpus was suspended for the first time due to the existence of a state of emergency. Since 1689, countries where the right to habeas corpus is guaranteed have experienced a variety of threats and other emergencies.

7. Emergency was declared, and using Article 352 of the Constitution, Indira Gandhi granted herself extraordinary powers and launched a massive crackdown on the political opposition. This included an ordinance declaring that Article 14 (right to equality), 21 (protection of life and liberty) and Article 25 (protection against arrest and detention) of the constitution was no longer available as a fundamental right, and thus the remedy of habeaus corpus was also not available. Also, it concerned the validity of s. 16(9A) of the Maintenance of Internal Security Act (MISA) that allowed for a detenu not to be given access to the grounds of his detention. Further, There was a disagreement between different High Courts whether the ordinance did in fact take away judicial power. In ADM Jabalpur v. Shivakant Shukla, in a majority opinion for a bench that included the Chief Justice, and was authored by Justice Mirza H. Beg held that

   > "liberty is not defined by natural law, but Liberty is confined and controlled by law, whether common law or statute. It is, in the words of Burke, a regulated freedom. It is not an abstract or absolute freedom. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are given, they are given because the Emergency is extraordinary, and are limited to the period of the Emergency."

   J. Khanna wrote a long dissenting judgment, which held that "Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning." Thus, rights are recognised by the Constitution, but not conferred by it.

   As GB has written, the heart of constitutional republic was the maintenance of a balance of power between the state and the individual.

   He emphasised a culture of justification – "a culture in which every exercise of power is expected to be justified." Only way to meet the larger goal is through compulsion. And this justification must be subject to review by the courts.

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8. ADM Jabalpur was given in a state of exception – where there is, according to the executive, an existential threat to its existence. As J. Beg said:

   > "…the security, integrity, and independence of the country, or the very conditions on which existence of law and order and of law courts depend, may be imperilled by forces operating from within or from outside the country. What these forces are, and how they are operating, what information exists for the involvement of various individuals, wherever placed, could not possibly be disclosed publicly or become matters suitable for inquiry into or discussion in a court of law."

   And J. Chandrachud : "matter of high State policy and questions of policy are impossible to examine in courts of law."According to him – democracy was sufficient to ensure that the "their chosen representatives will not willingly suffer an erosion of the rights of the people." This is flawed logic. There is no democracy without the oxygen of rights guaranteed by a

process of law mediated by lawyer. In its absence, democracy is merely a theatre production.
And CJI Ray opined that "People who have faith in themselves and in their country will not paint pictures of diabolical distortion and mendacious alignment of the governance of the country."
This is a dangerous idea, as the Nazi legal theorist Carl Shmitt wrote: "the sovereign is he who decides the State of the exception."

It was also stated that the right continued to exist despite the remedy of judicial review being taken way.

ADM Jabalpur also said that preventive detention prevents a greater danger to national security – it is the jurisdiction of suspicion, which of course would be entirely discretionary, within the absolute power of the executive.

> J. Beg said: clearly the question whether a person is of hostile origin or associations so that it is necessary to exercise control over him raises, not a justiciable but a political or administrative issue."

-Individual liberty was not the pinnacle – but "salus populi est supreme lex" – regard for public welfare is the highest law.

9. *Maneka Gandhi v. Union of India* was the repentant court's mea culpa for ADM Jabalpur. A substantive due process doctrine was put in place whereby fundamental rights had to be read holistically and not merely through the prism of formal due process.
    a. *But the basic problem remains, there cannot be too much power in the hands of the judges.* A liberal judiciary can easily become a conservative one, or one in which the executive exercises too much power, or one which is, to use a socialist parlance – committed, ideologically.

10. The importance of separation of powers is clear in the NJAC case, where a constitutional bench of the Supreme Court overruled a constitutional amendment which granted the PM, the President and the Judiciary a say in appointment of judges. It was held that independence of judiciary is a part of the basic structure of the constitution. That it is important to sustain democracy. Also that primacy of the judiciary in matters of appointment and transfer of judes ia also part of the basic structure of the constitution. Tjis derives from "consultation" by the President.Power of Reciprocity and Loyalty to Appointer.

11. There are areas of law where exceptions continue – sedition, terrorism, in Turkey, in France, in Spain, in India – it must be addressed.
12. The lowest court remanding a person to jail is the most important constitutional court.

13. One of the sons of a judge in the majority in ADM Jabalpur wrote last year in a judgment affirming the right of privacy. He held – "When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective of what was, but should never have been. ADM Jabalpur must be and is accordingly overruled."