

Freedom of Speech and Expression under the Indian Constitution: The National Emergency of 1975–1977

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Abstract

The Indian Constitution which guaranteed freedom of speech and expression is the most severely tested by the National Emergency proclaimed in the country on 25 June 1975. Article 358 and 359 of the Constitution deprived Article 19 of protection of freedom of speech and expression and in this paper the authors examine the implementation of this in practice through press censorship, the detention of political opponents and restriction of public assembly. It is a careful examination of the judicial reaction, especially the Supreme Court's judgment in *ADM Jabalpur vs. Shivkant Shukla* and Justice H.R. Khanna's dissent, and the political background – the Jayaprakash Narayan movement and the eventual reform which was effected by the Forty-fourth Constitutional Amendment. The short version of the argument is that the actual emergency era between 1975 and 1977 revealed that there was a serious deficiency in the original emergency provisions; this deficiency had a lasting impact on the relationship between the executive and individual liberty in Indian constitutional practice.

Introduction

Freedom of speech and expression occupies a place of special importance among the fundamental rights listed in Part III of the Indian Constitution. Article 19(1)(a) guarantees this freedom to every citizen, subject only to the reasonable restrictions permitted under Article 19(2) on grounds such as public order, decency, and the security of the state. The framers of the Constitution regarded this right as a precondition for a functioning democracy, since without the ability to criticise government and circulate opinion freely, elections and parliamentary accountability lose much of their meaning.

The Constitution, however, also contains emergency provisions under Part XVIII that allow the President to alter this balance in exceptional circumstances. Article 352 permits a proclamation of emergency on grounds of war, external aggression, or armed rebellion, the last term having replaced the original phrase internal disturbance after 1978. Article 358 provides that during an emergency declared on grounds of war or external aggression, the freedoms guaranteed by Article 19 are automatically suspended for the duration of the emergency. Article 359 goes further and allows the President to suspend the right of citizens to approach courts for the enforcement of any

fundamental right specified in the presidential order.

On 25 June 1975, President Fakhruddin Ali Ahmed proclaimed an Emergency on the advice of Prime Minister Indira Gandhi, citing internal disturbance as the ground. What followed over the next twenty-one months is still one of the most studied episodes in Indian constitutional history, because it tested how far the Constitution's emergency machinery could go in silencing dissent and curbing the press. This paper looks at that episode from two angles: the constitutional mechanism through which speech was restricted, and the political and judicial response it generated.

The Constitutional Mechanism of Suspension

The government issued an Emergency proclamation under Article 352, and was underlined by two Emergency proclamations (under Article 358 and 359) in rapid succession on 27 June 1975. Article 358 withheld protection from Article 19, and during the duration of the Emergency, the Executive no longer had any upper hand on freedom of speech, expression, assembly and movement. The citizens were denied the right to move any court in order to enforce equality before law, right to life and personal liberty and protection from arbitrary arrest and detention as provided in Articles 14, 21 and 22 as separate rights.

Combined, these two provisions rendered the substantive right to freedom of speech and expression as well as the procedural right to a remedy for its misuse unavailable for anyone.

The right to move any court was suspended in respect of the enforcement of Articles 14, 21 and 22 of the Constitution under a presidential order dated 27 June 1975. This order became the subject of the most consequential litigation of the period, since it appeared to leave detainees with no legal recourse whatsoever, even where detention orders were mala fide or contrary to the terms of the very statute under which they were made.

Press Censorship and the Practical Curtailment of Speech

The suspension of Article 19 was accompanied almost immediately by administrative measures that gave it practical effect. On the night of 25 to 26 June 1975, electricity supply to major newspaper presses in Delhi was cut in order to prevent the printing of the following day's editions. From 26 June 1975 onward, pre-censorship was imposed on all newspapers, requiring editors to submit news items, editorials, and photographs to government censors before publication. A Chief Censor was appointed at the centre, with regional censors stationed in the states, and the definition of objectionable matter was widened by executive order to cover criticism of the government or its leaders.

On 5 July 1975 telex transmissions sent by foreign correspondents were placed under prior screening, and the Cinematograph Act machinery was reconstituted on 20 July 1975 to tighten control over film content. In February 1976 the government merged four independent news agencies – the Press Trust of India, United News of India, Samachar Bharati, and Hindustan Samachar – into a single agency named Samachar, effectively removing competition and independent editorial judgment from wire reporting. During this period the Press Council of India, as a watchdog institution, was abolished. The Indian Express and the Statesman, which were independent papers, did visibly resist, occasionally running blank editorial columns to inform readers that the new regime had forbidden the publication of content, but most papers duly submitted to the new regime, not facing the prospect of closure.

In addition to press controls, a wide range of political personalities such as Jayaprakash Narayan, Morarji Desai, Atal Bihari Vajpayee and Lal Krishna Advani were detained under the Maintenance of Internal Security Act, which had also been amended during the Emergency in order to increase executive discretion. It is not difficult to imagine how tightly the machinery of speech control was coupled with physical enforcement against political opponents during the Emergency, as the Shah Commission of Inquiry came up with an estimate of nearly 30,000 detentions within a span of two years, following the conclusion of the Emergency in 1977.

The Judicial Response: ADM Jabalpur v. Shivkant Shukla

The biggest judicial fight over the limitations placed on freedom during the Emergency took place in ADM Jabalpur v.s Shivkant Shukla before the Supreme Court in 1976. The case stemmed from habeas corpus petitions filed on behalf of persons detained under the Maintenance of Internal Security Act (MISA), brought before several High Courts, where it was held that the presidential order under Article 359 preventing any inquiry into the validity of detention orders under MISA was unconstitutional. The Union government appealed these rulings to the Supreme Court.

A five-judge bench, by a majority of four to one, held that the right granted to the President to suspend recourse to any court for the enforcement of Article 21 excluded all other rights of any petitioner, and that no case could be raised against the legality of a detention on any basis, including failure to comply with the very provisions which sanctioned the detention. The majority held that, in a dilemma, the need for security outweighs any competing interest, and that the emergency was intended precisely to exempt Article 359 from judicial oversight. Justices A.N. Ray, P.N. Bhagwati and Y.V. Chandrachud formed part of the majority.

Justice H.R. Khanna alone dissented. He insisted that the right to life and personal liberty was not created by Article 21 but was also part of the rule of law and could not be taken away without the sanction of law. His dissent came at what he knew to be professional cost, as he was subsequently passed over for the position of Chief Justice, and it is now regarded as one of

the most significant minority opinions in Indian judicial history. Legal scholar Upendra Baxi, in *The Indian Supreme Court and Politics*, examined this period closely and argued that the majority judgment was authored by a court which had, at that time, set aside its constitutional responsibility in favour of the executive's political agenda.

The majority opinion in *ADM Jabalpur* was significantly reversed in later years. In *Maneka Gandhi v. Union of India* (1978), decided after the Emergency, the Supreme Court restated Article 21 to require that any procedure depriving a person of life or liberty be fair, just and reasonable, implicitly rejecting the formalistic and narrow interpretation of rights adopted during the Emergency. This correction was effected not only through judicial ruling but also through constitutional amendment, discussed below.

The Forty-Fourth Amendment and Institutional Correction

The Constitution (Forty-Fourth Amendment) Act of 1978 was introduced by the Janata Party Government following the Congress Party's defeat in the general elections of March 1977, as a safeguard against a repeat of the Emergency. The replacement of the phrase internal disturbance in Article 352 with armed rebellion established a more restricted basis for emergency, requiring more than administrative or political instability. The amendment also introduced procedural safeguards: the President could act during an emergency only after receiving the written advice of the Union Cabinet, and the time limit for parliamentary approval of a proclamation was reduced.

Most significantly for the subject of this paper, the amendment provided that the rights guaranteed under Articles 20 and 21 can never be suspended, even during an emergency, closing the specific gap that the majority in *ADM Jabalpur* had exploited. Article 359 was also amended to make clear that the right to move a court for the enforcement of Articles 20 and 21 remains available regardless of any presidential order. These changes did not alter Article 358's treatment of Article 19 as such, but they narrowed considerably the circumstances in which the article can operate, since Article 358 now applies only during an emergency declared on the ground of war or

external aggression, and not one declared on the ground of armed rebellion. Constitutional historian Granville Austin, in his account of the working of the Indian Constitution, described the Forty-Fourth Amendment as an attempt by the political class to build a form of institutional memory into the text itself, so that the specific techniques used in 1975 could not easily be repeated.

Political Perspectives on the Emergency

The suppression of speech during the Emergency cannot be separated from the political crisis that preceded it. The Allahabad High Court's judgment of June 1975, which found Indira Gandhi guilty of electoral malpractice in her 1971 Lok Sabha election and set aside her seat, created an immediate political threat to her government. The Jayaprakash Narayan-led movement for what was termed total revolution had, by early 1975, mobilised large sections of students and opposition parties around demands for the dissolution of state legislatures and resistance to what was described as growing authoritarianism. Historian Bipan Chandra, in his study of the period, situated the Emergency within this wider contest between an increasingly centralised Congress leadership and a fragmented but energetic opposition that used public speech, rallies, and the press as its principal instruments of mobilisation.

The suppression of speech during the Emergency was not incidental but was at the heart of the government's political effort: the opposition's ability to organise depended in large part on its ability to communicate through newspapers and public meetings. The government's own defence, particularly in the immediate aftermath of the Emergency, rested on the premise that internal disturbances and the possibility of civil disobedience required measures to ensure order and to maintain continuity in economic and social programmes. That defence was rejected by the electorate in the March 1977 general election, when the Congress Party, which had been in power, was defeated for the first time since independence – a result many interpreted as a rejection of the violations of civil liberties during the preceding twenty-one months.

The political fallout also gave rise to the Shah Commission of Inquiry, headed by Justice J.C.

Shah, which investigated excesses committed during the Emergency, including those in press censorship and the use of preventive detention. Its conclusions, though disputed in some respects, helped to build the public and parliamentary support that produced the Forty-Fourth Amendment. The episode continues to be invoked in later debates on executive power and press freedom, even within the framework of a written constitution such as India's.

Conclusion

The Emergency of 1975–1977 shows that the Constitution itself provided the grounds for suspending its own guarantee of free speech, and that this was done through a lawful mechanism. Articles 358 and 359, read together with a compliant majority on the Court in *ADM Jabalpur v. Shivkant Shukla*, gave the executive the means to suspend the fundamental right to free speech under Article 19 and to foreclose judicial remedies under Articles 14, 21 and 22, opening the way for press censorship, preventive detention and the silencing of political opposition. At the time, Justice Khanna's was the only dissenting voice among the judges. The subsequent vindication of that dissent, both in scholarly discussion and in constitutional amendment, shows that minority opinions can shape constitutional development even when they do not carry the decision.

The Forty-Fourth Amendment of 1978 remains the most direct institutional response to this history: it narrowed the grounds for emergency, protected Articles 20 and 21 from suspension under any circumstance, and confined the automatic suspension of Article 19 to emergencies declared on grounds of war or external aggression. Whether these safeguards are sufficient to prevent a similar suppression of speech in future remains an open question in Indian constitutional scholarship. But 1975 remains the case study that Indian constitutional scholarship keeps returning to when examining the relationship between emergency powers and freedom of speech.

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