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Rule of law in a State of Emergency by Subrata Roy Chowdhury

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'Rule of Law in a State of Emergency' Subrata Roy Chowdhury, Pinter Publishers Ltd., 25 Floral Street, London, 199, PP. 290—Price £ 35/-.

Subrata Roy Chowdhury has in this book presented to the students of International Law, as well as of politics and constitutional law, besides statesman and politicians, humanities expectations about minimum standards of respect for human rights in states of emergency. The study is based essentially in international law and therefore carries the problem of primacy which municipal law, inebriated with the heady wine of state sovereignty, has not yet conceded to international law. In the result, the book presents only the minimum standards recommended by the International Law Association (ILA) at their conference affairs in 1984.

The writer has thoughtfully structured his book to match the plant of the Paris Report. This is helpful for a study of the Paris Report itself. He has also drawn the readers attention to the Syracuse Principles (1984) which complemented the Paris Report. He has addressed the community of experts in international law through this comments in each section of the study which in section A deals with the declaration, duration and control of Emergency, Section B dealing with general principles for the protection of the individuals during and emergency powers regime, and section C dealing with non-derogable rights and freedoms and proposed by the Paris Report.

The Paris Report leaves it to the municipal law to define the procedure for declaring a state of emergency but requires safeguards against abuse of such powers through the requirement of a declaration of emergency. Such a declaration would operate as a public notice of the assumption of unstructured power which is par of the defence power acknowledged with any politically organised community. A right of self-preservation is conceded even to an individual the only safeguard lies in the measures of control.

The Paris Report sets score by the popular legislature to effectively control the emergency powers. But it does not appear from the book that any distinction has been made between legislature wherein voting under instructions is the rule and others wherein voting is not under instructions. In the first case there would not be any effective check of the executive because the executive and the legislative branches of government (the state) would be interacting through integration. Therefore, to the predicate a principle of the legislature controlling the executive would seem necessarily to require voting without instruments as the governing principle in the legislature. The recommendations for democratic control of an emergency regime (PP 44 et. seq) would seem to require this rider.

Art. 16 of the French constitution (1954) has been noted as a exception. The powers thereunder appear to be controlled by the purpose stated therein, viz 'to restore the functioning of constitutional institutions in the quickest possible time'. No doubt the provision has not elastic limit, but than, the French President under the fifth Republic Constitution is directly elected with an absolute majority.

Judicial review as a check against abuse of emergency powers has rightly been given the low-key position it really has. At its highest judicial control would only be policy

control and would necessarily have to be dependent upon the major policy choice which is essentially political. The Supreme Court of India has held in the *Minerva Mills Case* (A 1980 SC 1789) that the proclamation of an emergency would not normally be justified. The policy frame of Art 352 of the Indian Constitution reflects the position reached in *Elphinstone v Bedreechund* (1830) 1 Knap. P.C. 361 where material law once proclaimed was held to continue till revoked. In contrast would be the position in *Ex-parte Milligan* 4 Wall. 2 (1806) where the United States Supreme Court held that "material law can never exist where the courts are open and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war". Cessante razione legis cessante lex ipsa; Reviewability on question of a continued existence of facts which justified an emergency power regime however would be something which judicial process cannot always prove capable of. Yet perhaps the *Milligan* standard may be possibly a better standard of protection against emergency excess and should perhaps commend itself for consideration.

The Paris Report considers public emergency as "an exceptional situation of public danger permittance the exercise of crises powers in a particular state". This is clearly justified as power-all power-is purposive only. However, from this angle it would be difficult to include force majeure (natural calamities) or underdevelopment (See P. 15 et. seq) as emergencies justifying exercise of powers in a manner disrespectful of human rights. In these two situations it would perhaps be possible to hold that human rights questions arise only on the force of state inaction or inadequate or improper action by the public power holders trusted with the duties of protection and care. The case would seem to be different in the case of unstructured power situations of external aggression or internal disturbance which have to be met by matching unstructured power only. The ILA recommendations (at P. 20) of five over riding limitations for restricting fundamental rights even during an emergency are calculated to promote the rule of law and would be unexceptionable.

The provisions in section C dealing with non-derogable rights and freedoms would deserve serious attention. In the Indian constitutional context it would raise the question whether Arts 358 and 359 would not require a re-think. The existence of an emergency would automatically provide the necessary elastic for "reasonableness" for the restrictions on Art 19 freedoms and the several grounds enumerated in Art 19(2) to (6) would all stand covered in an emergency situation by the grounds of sovereignty and integrity of India and public order both of which will qualify as in the interests of the general public".

The book is a useful addition to students of international law, politics and constitutional law and should find a place in all libraries.

The title of the book would have more truly referred the reader to its contents had it carried a reference to the Paris Conferences. Perhaps a more appropriate title would be 'Rule of Law in a state of Emergency — The Paris Minimum Standards'.

It is a matter of regret that the elegance of the get up has been married by some carelessness in printing and binding. At P 13 the sub heading 'Public Emergency as defined in the Lawless case and the Greek case under the European Convention' should have been in italics as is the case with the other sub headings. The first sheaf of 32 pages containing the title page, contents and the foreword (*i* to *xi*), Preface (*xiii* to *xv*) and introduction (1 to 18) are carried twice over. This would seem to need a simple surgery.

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