

THE CONSTITUTION (THIRTY-EIGHTH AMENDMENT) ACT, 1975

India

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Statement of Objects and Reasons appended to the Constitution (Thirty-ninth Amendment) Bill, 1975 which was enacted as the Constitution (Thirty-eighth Amendment) Act, 1975 **STATEMENT OF OBJECTS AND REASONS** The Constitution (Thirty-ninth Amendment) Bill, 1975 seeks to amend articles 123, 213, 239B, 352, 356, 359 and 360 of the Constitution.

2. Article 123 empowers the President to promulgate Ordinances when both the Houses of Parliament are not in session if he is satisfied that circumstance exist rendering it necessary to take immediate action. Corresponding powers have been conferred by the Constitution on the Governor under article 213. Similar powers have been conferred on the Administrator under article 239B when the Legislature of a Union territory is not in session. On the plain language of articles 123, 213 and 239B there is no doubt that the satisfaction mentioned in those articles is subjective satisfaction and that it is not justiciable. There is no doubt that this was also the intention of the makers of the Constitution. However, litigation is pending involving the justifiability of this issue and contentions are being raised that the issue is subject to judicial scrutiny. To place the matter beyond doubt, it is proposed to provide in the Constitution that the satisfaction of the President, Governor or Administrator shall be final and conclusive and shall not be questioned in any court on any ground.

3. Article 352 empowers the President to declare Emergency if he is satisfied that the security of India or any part of it is threatened by war, external aggression or internal disturbance. Article 356 empowers the President to assume to himself the functions of the Government of a State if the constitutional machinery in any State fails and the Government in the State cannot be carried on. Likewise article 360 empowers the President to declare Financial Emergency if he is satisfied that the financial stability of India is threatened. Here again, the issue regarding satisfaction is, on the face of the articles clearly not justiciable. However, as the validity of the Proclamation issued under article 352 has been challenged in several proceedings and as litigation of this nature involves waste of public time and money, it is proposed to amend these three articles so as to make the satisfaction of the President final and conclusive and not justiciable on any ground.

4. In addition to article 352, contentions have been raised in certain writ petitions that while the original Proclamation of Emergency is in operation no further Proclamation of Emergency could be made thereunder. In order to place the matter beyond doubt it is proposed to make it clear in article 352 that the President may issue different Proclamations on different grounds whether or not there is a Proclamation already in existence and in operation.

5. When a Proclamation of Emergency is in operation, the President is empowered under article 359 of the Constitution to make an order suspending the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in that order. It was intended that the powers conferred by this article should be exercised during an emergency according to needs of the situation. On the other hand, article 358 renders the provisions of article 19 automatically inoperative while the Proclamation of Emergency is in operation, and the power to make any law or to take any executive action is not restricted by the provisions of that article. The intention underlying article 359 appears to be that when an order is made under clause (1) of that article in relation to any of the rights conferred by Part III and mentioned in the order, the order so made would have for all practical purposes the same effect in relation to those rights as article 358 has in relation to article 19. It is, therefore, proposed not to have any differences in language between article 358 and the language in respect of those rights only which may be mentioned in the Presidential Order under

clause (1) of article 359.

6. The Bill seeks to achieve the aforesaid objects.

An Act further to amend the Constitution of India. BE it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:-

1. Short title.-

This Act may be called the Constitution (Thirty-eighth Amendment) Act, 1975.

2. Amendment of article 123.-

In article 123 of the Constitution, after clause (3), the following clause shall be inserted, and shall be deemed always to have been inserted, namely:-(4) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground."

3. Amendment of article 213.-

In article 213 of the Constitution, after clause (3), the following clause shall be inserted, and shall be deemed always to have been inserted, namely:-(4) Notwithstanding anything in this Constitution, the satisfaction of the Governor mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground."

4. Amendment of article 239B.-

In article 239B of the Constitution, after clause (3), the following clause shall be inserted, and shall be deemed always to have been inserted, namely:-(4) Notwithstanding anything in this Constitution, the satisfaction of the administrator mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground."

5. Amendment of article 352.-

In article 352 of the Constitution, after clause (3), the following clauses shall be inserted, and shall be deemed always to have been inserted, namely:-(4) The power conferred on the President by this article shall include the power to issue different Proclamations on different grounds, being war or external aggression or internal disturbance or imminent danger of war or external aggression or internal disturbance, whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.(5)Notwithstanding anything in this Constitution,-(a)the satisfaction of the President mentioned in clause (1) and clause (3) shall be final and conclusive and shall not be questioned in any court on any ground;(b)subject to the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any

question, on any ground, regarding the validity of-(i)a declaration made by Proclamation by the President to the effect stated in clause (1); or(ii)the continued operation of such Proclamation.".

6. Amendment of article 356.-

In article 356 of the Constitution, after clause (4), the following clause shall be inserted, and shall be deemed always to have been inserted, namely:-"(5) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground.".

7. Amendment of article 359.-

In article 359 of the Constitution, after clause (1), the following clause shall be inserted, and shall be deemed always to have been inserted, namely:-"(1A) While an order made under clause (1) mentioning any of the right conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part 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 order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.".

8. Amendment of article 360.-

In article 360 of the Constitution, after clause (4), the following clause shall be inserted, and shall be deemed always to have been inserted, namely:-"(5) Notwithstanding anything in this Constitution,-(a)the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground;(b)subject to the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of-(i)a declaration made by Proclamation by the President to the effect stated in clause (1); or(ii)the continued operation of such Proclamation.".[The Constitution (Thirty-Eighth Amendment) Act, 1975, codified the declaration of Emergency and empowered the State to remove fundamental rights during a state of emergency. This made the Emergency final and inclusive, giving the State the power to suspend certain rights of its citizens. Currently, there is an ongoing amendment procedure aimed at eliminating obsolete and unproductive portions of the Constitution and integrating new ones to address evolving social requirements. Any changes made should aim to improve people's living conditions and foster social peace, rather than demolishing the current framework."Also Refer]