EMERGENCY POWER AND JUDICIAL PASSIVITY: A COMPARATIVE CONSTITUTIONAL STUDY

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ABSTRACT

This paper examines the exercise of emergency power in India and the historical passivity of judiciary has been discussed and the effect on constitutional governance and fundamental rights is also analysed. This study will critically look at the application of Articles 352, 356, and 360 with reference to the 1975 Emergency and more recent forms of an informal emergency, as exemplified by prolonged internet shutdowns, preventive detentions under the UAPA, and dissent restrictions. The research compares the judicial responses in India to those of the United States and Germany through a comparative constitutional approach, where the study focuses on the institutional design, review of proportionality, and protection of non-derogable rights. The current body of literature presents a number of gaps: theoretical literature covers the powers of emergency but usually does not consider judicial responsibility and its disproportionate impact on minorities and dissenters. Indian scholarship describes abuse of emergency powers in the 1975-77 period, but has little comparison or analysis of current tendencies. It has been concluded in this paper that the contemporary emergency-like measures are not disproportionately applied to the minority, and judicial responses are not necessarily consistent, hence the need to be more resilient with the institutional protection. The paper finds that, even though not announced as such, modern emergency practices still serve to make less privileged groups and political opponents disproportionately subject to emergency actions, with judicial reactions also being uneven and often deferential. It suggests that India should make its institutions more secure, such as a time-limited mandatory judicial review of emergency proclamations, new terms to ensure better checks on preventive detention, clear proportionality guidelines, and succinct expression of non-derogable rights, to prevent recurrence of the issue of executive overreach. In the absence of these reforms, India will keep on reliving a process of erosion of rights and executive hegemony during times of crisis.

Keywords: Emergency Powers, Judicial review, Constitutional crisis, Comparative Constitutional Law, Fundamental Rights, Preventive Detention, Internet Shutdown, Anti-Terror Legislation, Executive Overreach

1. Introduction

Emergency powers are significant in constitutional democracies where the government takes extraordinary powers in out of the ordinary times when things are at stake and the survival of the nation, the safety of the state and the order of the people are of paramount importance. Articles 352, 356, and 360 provisions were enshrined by the constitutional framers, who were concerned about the vulnerabilities of a newly independent state. These provisions addressed the national, state, and financial emergencies.[1] During war, external aggression, civil strife, or economic crisis, these provisions are fully aware that there is a need of prompt executive action. Yet, emergency powers are abused although they are intended to safeguard the state. Their highly unique nature exposes them to abuses such as exploiting them to gain political interest, tramp down dissent, and denying the basic rights. India's own history of the Emergency of 1975 indicates this struggle at its most toxic form: censorship imposed by the state, arrested political leaders and civil society activists, suspended basic fundamental rights, and the judiciary failed to safeguard the Constitution.[2] The Supreme Court decision in ADM Jabalpur v. Shivkant Shukla (1976), upholding suspension of the right to life and liberty, has been considered a "dark chapter" in Indian constitutional history, representing the judiciary's failure to stand firm at times of national crisis.

Though India has not officially declared an emergency since 1975, the similar problems still exist today. Actions like prolonged internet shutdowns in Kashmir and Manipur, excessive use of preventive detention laws like the UAPA i.e. Unlawful Activities (Prevention) Act and the National Security Act (NSA), and suppression of protests reflect the rise of 'informal emergencies'. Although these are not constitutionally proclaimed under constitutional provisions, they work like emergencies by giving the executive more power while weakening the civil rights. Reports by human-rights groups such as Amnesty International and the Internet Freedom Foundation show that India over the past few years has had the highest number of internet shutdowns in the world, and these have disproportionately affected minority communities and dissenting voices.[3] However the courts, have generally remained reluctant to step in, repeating the same inaction seen in 1975. Emergency powers and national security laws

[1] Emergency Provisions: Articles 352-360, LawFoyer (n.d.), https://lawfoyer.in/emergency-provisions-articles-352-
[2] ADM Jabalpur v Shivkant Shukla (1976): The Emergency Jurisprudence (2023), https://lexibal.in/case-law-adm-jabalpur-v-shivkant-shukla-1976-the-emergency-jurisprudence/
[3] Manisha Madapathi, Digital Barricades and Blackouts: A Case of Internet Shutdowns in India, 12 Media & Commc'n (2024), https://www.cogitatiopress.com/mediaandcommunication/article/view/8511

have been increasingly used to target minority communities, activists, and protest movements, while the courts rarely check if those actions are having disproportionate or discriminatory effect. This reluctance on the part of the courts raises serious concerns about the weakening of constitutional guarantees of liberty, equality, and democratic accountability.

In contrast, other constitutional democracies have built stronger institutional safeguards. In the United States, although the executive has historically expanded power during crises, the Supreme Court has repeatedly reviewed and checked such actions, as seen in the case of Youngstown Sheet & Tube Co. v. Sawyer, when the Court checked presidential overreach in wartime[4]. Likewise, in Germany, the Federal Constitutional Court, guided by the Basic Law's "eternity clause," has always ensured the required proportionality and non-derogable rights such as human dignity so that security measures during emergencies may never fully overshadow constitutional identity. These comparative examples shows the institutional possibilities for balancing state security with individual rights, a balance still weakly evolved in India's judicial culture.

In this context, the current research recognizes an important gap in practice and scholarship. Although the 1975 Emergency has had lots of research attention, there is less work on more recent trends of emergency-like governance without lawful proclamations, specifically the disproportionate effects of security policies on minorities and dissenters, and the judiciary's uncertain role in dealing with these issues. This study is organized around four research questions: (1) How has the Indian judiciary understood and reacted to the invocation of emergency powers under Articles 352, 356 and 360 of the Indian Constitution, particularly during the 1975 Emergency and in recent cases of executive excess? (2) What are the differences and similarities between constitutional provisions and judicial outcomes regarding national emergencies in India, the United States, and Germany? (3) Are emergency provisions in India disproportionately affecting minority groups and dissidents, and how has the judiciary responded or failed to respond to this bias? (4) Institutional reforms or judicial doctrines that can be proposed or strengthened in India to achieve greater judicial accountability and protection of rights during future emergencies?

To answer these questions, the research seeks to attain four main goals: first, to critically examine the constitutional provisions that regulate emergency powers in India and assess

[4] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

judicial reaction during both the 1975 Emergency and recent crises; second, to conduct a comparative analysis of India, the United States, and Germany in order to determine how various constitutional orders organize emergency powers and judicial review; third, to examine whether emergency powers and Indian national security structures disproportionately disadvantage minorities and dissenters, and to what extent judicial attention has been given to these issues; and fourth, to suggest legal and institutional reforms that enhance judicial independence, incorporate stronger review mechanisms, and develop doctrines that protect basic rights amidst crisis.

The main hypothesis of this study is that the Indian judiciary has traditionally been passive instead of assertive during emergencies or crises, which has allowed executive overreach. Unlike the United States and Germany, where the judiciary has evolved doctrines and mechanisms to uphold constitutional identity and rights in emergencies, India has lacked consistent judicial accountability. Accordingly, unless institutional reforms and doctrine-based safeguards like mandatory review procedures, enhanced proportionality testing, and recognition of non-derogable rights are enacted, India threatens to repeat cycles of unchecked executive rule and deprivation of rights in times of future crises.

2. Literature Review

Guillaume Tusseau provides a theoretical and comparative foundation of major significance through challenging whether emergencies are able to be managed within the boundaries of law or if they inevitably flow past legal boundaries. Based on such thinkers as Carl Schmitt and Santi Romano, he counteracts explanations of emergencies as extra-legal events or as potential authors of new legal frameworks. Through the use of examples from Germany, France, and the United States, Tusseau demonstrates how exceptional powers disrupt parliamentary processes and restrict liberties such as freedom of movement and speech. His focus on phenomenology and ontology of emergencies contributes greatly to the conceptual discussion, though he neglects the role of the judiciary in upholding rights during crises.[5]

C.C. Schweitzer also offers a comparative view in his analysis of the 1968 revision of the German constitution, intended to curb executive abuses such as the Weimar experience. He appreciates the provision for parliamentary restraints like the Joint Committee, but warns that

[5] Guillaume Tusseau, The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach, 97 ARSP: Arch. Fur Rechts-& Sozialphilosophie 498 (2011)

loose terms such as "especially grave danger" may still be abused. His critique points out loopholes and weaknesses in emergency systems, but mentions nothing about issues of public trust and resilience towards emerging threats like cyberattacks.[6] Daniel J. Tichenor deepens the theoretical discussion from an American point of view by proposing the concept of "historical set points." According to him, presidential emergency powers develop gradually through precedent, temporary powers getting converted into permanent executive authority features. Although providing a historically informed analysis, Tichenor does not explore the communication strategies by which presidents try to explain emergency measures to citizens.[7]

Christopher A. Casey challenges a legislative effort to limit executive power under the International Emergency Economic Powers Act (IEEPA). While conceived as a congressional check, he contends that judicial deference—such as in Dames & Moore v. Reagan—has weakened its impact. His book illustrates how ambiguous statutory provisions continue to expand executive discretion, particularly in uncharted areas like cybercrime and AI rulemaking.[8]

B.C. Das gives a structural analysis of India's constitutional emergency powers under Articles 352, 356, and 360. He justifies these provisions as mechanisms to maintain national integrity but also acknowledges their ability to skew India's federal equilibrium in the Union's favor. His work still remains short of comparative intensity and avoids any serious assessment of the judiciary's role.[9] Rajni Kothari critically evaluates the political abuse of the 1975 Emergency on the grounds that it undermined pluralism, federalism, and participatory politics. His anxiety is towards centralization of authority and dissipating local participation in politics. However, Kothari fails to explain how India's democratic institutions bounced back after 1977, leaving room for investigation into long-term institutional resilience.[10]

Aaron S. Klieman makes a more general institutional critique, detailing how Parliament, the courts, the media, and federalism were brought under executive domination during the Emergency. His interest is in authoritarian consolidation but also in the absence of institutional

[6] C.C. Schweitzer. Emergency Powers in the Federal Republic of Germany, 22 W. Pol. Q. 112 (1969)
[7] Daniel J. Tichenor, Historical Set Points and the Development of U.S. Presidential Emergency Power, 11 Persp. On Pol, 769 (2013)
[8] Christopher A Casey, The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emertgency Power, 96 Harv. L. rev. 1102 (1983)
[9] B.C.Das, Emergency Provisions in the Indian Constitution: A Study in Comparative Analysis, 38 India J. Pol. Sci (1977)
[10] Rajni Kothari, Restoring India’s Political Process, 53 Va. Q. Rev. 1 (1977)

resistance. But he does not answer the question of how voting behavior and public attitudes influence democratic recovery from authoritarian rule.[11] J.R. Siwach analyses the abuse of emergency powers in 1975–77, chronicling press censorship, mass arrests by MISA, and campaigns of forced sterilizations. He sees the 44th Amendment as remedial, especially in redefining "internal disturbance" as "armed rebellion" and restoring judicial review. But he cautions that loose definitions and parliamentary majorities can still allow for abuse.[12]

A.G. Noorani provides a vigorous legal criticism of the judiciary during the Emergency, specifically of the Supreme Court's acquiescent approach in ADM Jabalpur v. Shivkant Shukla. He identifies judicial weakness partly because of political encroachment in appointments. While Noorani chronicles lapses, he does not adequately address institutional reforms that could make the judiciary more independent in the future.[13] Daniel C. Kramer compares how courts in the U.S., U.K., India, and France act during times of crises. He deploys the idea of "judicial incrementalism," observing that courts tend to change their cautious interpretive approach under emergencies, sometimes by deferring completely to the executive or sometimes by rejecting its actions. Cases like Korematsu v. United States, Liversidge v. Anderson, and ADM Jabalpur show how courts have deferred to the government, though exceptions like Ex parte Bollman indicate that resistance can happen. Kramer emphasises on the Institutional dependence and patriotism but not the influence of the media, public opinion, and international human rights norms.[14]

In these studies, some gaps are created. To begin with, whereas theoretical works concentrate on conceptual and structural aspects of the emergency powers, they do not concentrate on judicial reactions and the aspect of the trust of the people. Second, Indian scholarship inaccurately records and institutional dilution in the time of the Emergency of 197577, even though it would have given a more limited comparative perspective on how the courts of other democracies have acted in similar situations. Third, judicial interpretations focus on passivity and downplay the role of the populace, mass media, and transnational norms in judicial

[11] Aaron S. Klieman, Indira's India: Democracy and Crisis Government, 96 Pol. Sci. Q. 241 (1981)
[12] J.R. Siwach, Misuse of Emergency powers in India and Nature of Amended Institutional Safeguards, 40 Indian J. Pol. Sci. 651 (1979)
[13] A.G. Noorani, the Judiciary and the Bar in India During the Emergency, 11 Verfassung u. Recht in Ubersee 403 (1978)
[14] Daniel C. Kramer, the Courts as Guardians of Fundamental Freedoms in Times of crisis, 2 Universal Hum. Rts. 1 (1980)

behaviour.

3. Judicial Interpretation and Response to Emergency Powers in India

3.1. Constitutional Background

In India, extraordinary powers to the executive are provided in Articles 352, 356 and 360 of the Indian Constitution during the periods of crisis.[15] Article 352 authorizes the government to impose a National Emergency when there is war, external aggression, or armed rebellion; Article 356 authorizes the imposition of President's Rule when the constitutional machinery of the state fails, and Article 360 permits a Financial Emergency when the economic stability of the country is under threat. These emergency provisions were designed to protect the sovereignty, unity, and national stability. However, using these powers often involves a careful balancing act between the government's urgent actions and the protection of fundamental democratic rights.

3.2. Judicial Role during the 1975 Emergency and Post-Emergency

The 1975 Emergency was the most significant test of these provisions, which exposed the judiciary's inability to safeguard basic freedoms and liberties. In A.D.M. Jabalpur v. Shivkant Shukla (1976)[16], the Supreme Court of India upheld the suspension of habeas corpus, holding that even the right to life under Article 21 could be curtailed during an Emergency. This ruling has since been considered as one of the darkest moments in Indian constitutional history and is used as an illustration of judicial inactivity when dealing with executive overreach.[17] Legal commentators such as A.G. Noorani have argued that the decision represented an abdication of the judiciary's duty as the guardian of fundamental rights.[18]. To prevent a recurrence, the 44th Constitutional Amendment of 1978 introduced important safeguards, including a prohibition on suspending Articles 20 and 21 even during a National Emergency.[19]

In the post-Emergency era, the judiciary sought to correct its earlier mistakes and reclaim its constitutional role. In Minerva Mills v. Union of India (1980), the Court reaffirmed the

[15] INDIA CONST. arts. 352, 356, 360.
[16] A.D.M. Jabalpur v. Shivkant Shukla, (1976) 2 S.C.C. 521
[17] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 857–60 (4th ed. 1991).
[18] A.G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS 136–38 (2006).
[19] The Constitution (Forty-Fourth Amendment) Act, No. 45 of 1978, INDIA CODE (1978).

balance between Fundamental Rights and Directive Principles, holding that unchecked executive authority was unconstitutional. In S.R. Bommai v. Union of India (1994), the Supreme Court reinforced judicial review by declaring that proclamations of President's Rule under Article 356 were subject to scrutiny, can be examined by the courts and could not be exploited for political purposes. Additionally, the Kesavananda Bharati v. State of Kerala (1973)[20] Decisions, though predating the emergency, became instrumental in limiting abuse of emergency powers, as the Basic Structure Doctrine prevented any attempt to undermine democracy or the rule of law through constitutional amendments.

3.3. Recent Judicial Trends

In recent decades, the judiciary has shown a more cautious but somewhat inconsistent role. In Arunachal Pradesh[21] and Uttarakhand[22] In the crises of 2016, the Court intervened to restore elected governments, underscoring that Article 356 could not be used arbitrarily. During the COVID-19 pandemic, while no formal Emergency was declared, executive restrictions resembled emergency-like conditions. The judiciary attempted to balance public health necessities with individual rights but often leaned towards deference to executive discretion.[23] Similar debates persist around the use of ordinances, preventive detention, and anti-terror laws during crises, raising concerns that judicial vigilance is selective rather than systematic.

The Judiciary strategy has changed from passivity in the 1975 Emergency to an active constitutionalist in the 1980s and 1990s, followed by a reserve and intermittent role in recent times. This pattern tends to raise an important question: has the judiciary really achieved the right balance between protecting constitutional freedoms and recognizing the government's need for executive necessity? Despite the fact that the corrective actions that were undertaken in the period after 1977 regained the trust of the people in judicial review, the fact that the court still tends to defer in certain situations involving crises indicates that the war between individual freedom and executive power is yet to be resolved. Thus, it is very important to enhance judicial norms and rights protection to

[20] Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225
[21] Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 S.C.C. 1
[22] State of Uttarakhand v. Union of India, (2016) 10 S.C.C. 1
[23] Gautam Bhatia, Public Health and Fundamental Rights: The Indian Judiciary during COVID-19, 10 INDIAN L. REV. 45, 47–50 (2021).

make sure that emergency powers can protect the country without subverting democracy.

4. Comparative Framework – India, USA, and Germany

4.1. United States

Unlike India's consolidated emergency code, the U.S. Constitution disperses crisis powers across multiple provisions, with courts acting as a continual check on the President. Classic separation-of-powers review emerged in Youngstown Sheet & Tube Co. v. Sawyer[24], where the Supreme Court invalidated the seizure of steel mills during the Korean War by President Truman, and Justice Jackson's three part framework became the standard tool or method to evaluate executive authority in relation to Congress. Earlier, Ex parte Milligan limited military jurisdiction over civilians in areas where civil courts remained open, signaling that even war does not erase constitutional constraints. At the same time, history shows deference at the outer edges: Korematsu upheld mass internment during World War II (notorious today and expressly repudiated in Trump v. Hawaii),[25] while Dames & Moore v. Regan[26] reflected judicial willingness to sustain presidential emergency economic measures in the face of congressional acquiescence. After 9/11, the Court re-centered judicial review over detention and trial of terrorism suspects: Hamdi v. Rumsfeld[27] required due-process hearing rights for U.S. citizens designated enemy combatants, Hamdan v. Rumsfeld struck down military commissions created without congressional authorization[28], and Boumediene v. Bush[29] held that the Suspension Clause guarantees habeas review for detainees at Guantánamo. Statutorily, the National Emergencies Act (NEA) and International Emergency Economic Powers Act (IEEPA) cabin and channel presidential declarations, creating reviewable predicates and reporting duties, frameworks that courts read against the separation-of-powers backdrop.[30] Although the U.S. courts sometimes defer to the executive, its default architecture treats emergencies as situations for intensified judicial scrutiny, especially

[24] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–89 (1952).
[25] Korematsu v. United States, 323 U.S. 214 (1944), 138 S. Ct. 2392, 2423 (2018).
[26] Dames & Moore v. Regan, 453 U.S. 654, 668–75 (1981).
[27] Hamdi v. Rumsfeld, 542 U.S. 507, 533–39 (2004).
[28] Hamdan v. Rumsfeld, 548 U.S. 557, 593–635 (2006).
[29] Boumediene v. Bush, 553 U.S. 723, 739–42, 771–92 (2008).
[30] National Emergencies Act, 50 U.S.C. 1601–1651; International Emergency Economic Powers Act, 50 U.S.C. 1701–1707.

when individual liberty is at stake.

4.2. Germany

The Basic Law (Grundgesetz) of Germany develops a structural counterpoint to drift into authoritarianism by means of institutionalized values and an emergency constitution. Ewigkeitsklausel (eternity clause) ensures that the core principles, human dignity, democracy, federalism, and rule of law cannot be derogated through any emergency by the constitution.[31] The soldier/defense emergency procedures (Arts. 115a-115l) are codified in the Notstandsverfassung (1968) and there is a guarantee against the erosion of the essential content of fundamental rights (Wesensgehaltsgarantie) but the power is decentralized and is regulated by parliament (Arts. 115a-115l).[32] The Federal Constitutional Court (BVerfG) operationalizes these commitments through a rigorous proportionality test and a robust doctrine of constitutional identity. The Court in the case of Aviation Security Act struck down a law that had given authority to down aircraft hijacks on the ground that killing innocent persons contravened human dignity (Art. 1(1)), which had no balance even in the face of extreme events.[33] The informational self-determination was constitutionalized earlier by the Census Act judgment, which defined the way in which the security-related measures should be narrowed and rights-conformable.[34] Both the Lisbon Treaty decision and the earlier decision in the case of the Lisbon Treaty confirmed that constitutional identity based on democratic self-determination and rights is not sacrosanct on the altar of political branches, which has obvious consequences for emergency rule.[35] German doctrine combines text like eternity clause, emergency chapters with strong judicial enforcement, ensuring that rights and structural principles effectively cannot be overridden.

4.3. Comparative Insights

The Articles 352, 356, 360, and the traditionally allowed wholesale suspension of rights that had been the case in ADM Jabalpur in 1975 vested emergency powers in the Indian

[31] GRUNDGESETZ [GG] [BASIC LAW], art. 1(1), art. 20, art. 79(3) (Ger.).
[32] Id. arts. 19(2), 115a–115l.
[33] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 1 BvR 357/05 (Aviation Security Act), para. 124–31, BVerfGE 115, 118 (Ger.).
[34] BVerfG Dec. 15, 1983, 1 BvR 209/83 (Census Act), BVerfGE 65, 1 (Ger.).
[35] BVerfG June 30, 2009, 2 BvE 2/08 (Lisbon Treaty), BVerfGE 123, 267 (Ger.).

Constitution, which has since been the case in subsequent cases like Minerva Mills, S.R Bommai and the Forty-Fourth Amendment in 1977, though left incomplete on the day-to-day management of emergencies and on the so-called informal emergencies.[36] In contrast, the U.S. model considers an emergency to be a separation-of-power issue, which accommodates case-by-case judicial tuning, as Youngstown to Boumedaine, where Germany places hard constitutional stops before it, such as the eternity clause; an essential-content assurance that a court is supposed to exercise with great proportionality and identity scrutiny. Two aspects of India that comparative scholarship lessons indicate are institutional design is relevant, that having rights insulated against majorities and mechanisms of proportional review (Germany) or separation of powers (U.S.) both discourage the emergence of crisis exceptionalism and the attendant abuse of power[37] and judicial posture, that proportional review (Germany) or separation of powers (U.S.) fosters the development of crisis exceptionalism and its consequences. It would become constitutional practice to have explicit non-derogable cores (e.g. explicit Articles 20-21 insulation already initiated by the 44th Amendment), prescriptive control of invocations and renewals of a parliament, and a regular proportionality regime of all emergent-like actions (such as preventive detention and shutdowns) in the instance of India. A court which can say very definite things as contrasted with the sporadic interventions can turn the passivity into the condition of caution, into a well-founded constriction jurisprudence.

5. Emergency Provisions, Minorities, and Dissent

The application of emergency powers and security legislation in India has demonstrated on numerous occasions to have a disproportionate effect on minority groups, activists, and political critics. It is the most dramatic historical case: the opposition leaders, journalists and activists were imprisoned and civil liberties limited way beyond any particular security considerations.[38] This trend is seen nowadays as well, without any official declaration of Emergency being made, using preventive detention statutes, anti-terror laws like the Unlawful Activities (Prevention) Act (UAPA), and otherwise such as prolonged internet blackouts.[39] Human-rights activists and academics have documented

[36] A.D.M. Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521; Minerva Mills Ltd. v. Union of India, (1980) 2 SCC 591; S.R. Bommai v. Union of India, (1994) 3 SCC 1; The Constitution (Forty-Fourth Amendment) Act, 1978.
[37] Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029, 1042–49 (2004).
[38] Supra note. 37
[39] B.V. Kumar, Preventive Detention Laws of India 201–12 (2019).

many occasions in which these jurisdictions have been invoked against LGBTQ+ and religious minority activists, Dalit activists, student activists, and independent journalists, proving that the authorities of emergency are not used in response to a real threat to security but against political expression and opposing views.[40] The Bhima Koregaon arrests (the "BK-16" cases) and the arrests of journalists and activists in more recent crackdowns illustrate how allegations of "terrorism" or "conspiracy" under broad statutory definitions can be pressed against civil-society actors and intellectuals involved in dissent or minority rights work.[41] Scholarly commentary and case studies show that such arrests often rely on weak or circumstantial evidence and long investigative delays, increasing the risk of pretrial detention becoming the effective punishment.[42]

There has been an unequal effort by the judiciary to check these disparities. The low point, the position of the Supreme Court in A.D.M. Jabalpur v. Shivkant Shukla in the 1975 Emergency, an allegory of how courts may facilitate rights elimination on the occasion of supposed crisis.[43] Courts have since occasionally reversed course e.g. post-Emergency jurisprudence tightening the belt on executive power, but in the venue of UAPA and other preventive systems are often manifestly reluctant to provide relief.[44] Various trends were noted by academics and legal observers: it has made it easy to be classified by the prosecution as actions constituting terrorism at the prima facie stage, bail is nearly impossible under UAPA, and judicial review of executive investigations is slow and procedural instead of investigative.[45] These broad statutory terms, wide prosecutorial discretion, and strict judicial bail practice produce a system where accused dissenters, including minorities, spend long periods in custody without resolution. The Bhima Koregaon saga and several high-profile journalist arrests under UAPA and related laws, for instance, the NewsClick case, have prompted critiques from civil-liberties

[40] Human Rights Watch, India: Arrests, Raids Target Critics of Government (Oct. 13, 2023), https://www.hrw.org/news/2023/10/13/india-arrests-raids-target-critics-government ; Amnesty International, India: Protesters Arrested for Opposing Bigoted Law (2020), https://www.amnesty.org/en/documents/asa20/2269/2020/en/
[41] Alpa Shah, The Incarcerations: BK-16 and the Search for Democracy in India (2024).
[42] Olivia Hati, Examining the Bhima Koregaon Case: An Analysis of the Legal Issues, 12 J.L. & Religion Stud. 45, 50–56 (2022)
[43] Supra note 39 at 521.
[44] Supra note 37
[45] V. Venkatesan, Bail Under UAPA: A Jurisprudence of Incarceration, Econ. & Pol. Wkly., June 12, 2021, at 17

scholars and NGOs that the courts are not consistently protecting vulnerable groups from selective enforcement.[46]

5.1. Contemporary Concerns

The existing problems become deeper than the personal arrests to institutionalized practices that recreate the state of emergency: periodic blackouts of the internet, the mass administrative detentions, and the wide use of the preventive orders.[47] Such actions tend to affect marginalized groups in social and economic disproportion, blocking access to information, legal assistance, and communication, which adds to the impact of detention and surveillance.[48] Human-rights reports record that inefficiencies in judicial hearings, problems in accessing an attorney, and the stigmatizing impact of the labels of terrorism place an environment in which liberty is effectively limited despite the lack of prompt convictions.[49] Unless courts take a more stringent approach to demand greater governmental justification, meaning a meaningful proportionality analysis, and an effective remedy process which must be prompt and effective, the trend of selective targeting would likely persist and the constitutional promise of equal protection would be eroded, scholars say.[50]

Both the results and legal analysis agree on two aspects: first, the emergency type of legislation and practices in India have been used in many instances wrongly, imposing a disproportional burden on minorities and dissenters; and secondly, the judicial system has proved to be ineffective in resisting this bias, in most cases, through the favorable bail provision, the impossibility of considering the case at an early stage, and the slow court redress. To lessen the discrimination, researchers suggest modification that involves restriction in the statutory definitions, expansion of bail and evidence safeguarding, common judicial assessment of lengthy detention, and prompt access to counsel as well as evidence, which would allow the elimination of discrimination and recuperate protection of the court to the advantage of vulnerable populations.

[46] Supra note 41
[47] Indian Council for Research on Int'l Econ. Rels., The Anatomy of Internet Shutdowns in India(2021).
[48] Amnesty Int'l, supra note 47.
[49] Human Rights Watch, supra note 41.
[50] A.G. Noorani, Constitutional Questions and Citizens' Rights 87–104 (2006).

5.2. Institutional Reforms and Judicial Doctrines for the Future

One of the key lessons of the Indian emergency experience is that judicial responsibility should not be focused on sporadic occasions, but made structural. A compulsory remedial look into any Emergency proclamation by the Supreme Court within a period of time is one such proposal that has been frequently suggested in doctrinal literature. Today, judicial review may be partial, but no more than reactive and slow; a specific, temporary, statutory or constitutional qualification, that the Supreme Court or a selectively constituted constitutional bench, hear and adjudicate challenges to the emergency proclamations within a fixed and limited time frame, such as 60-90 days, would place on modern judicial review and put an end to the interval of unchallenged executive action. There are scholarly grounds and justifications to support this proposal, such as comparative and doctrinal scholarship to the effect that crises need institutionalized checks not discretionary ones and Indian scholarship to the effect that clearer review mechanisms need to be in application in relation to Article 352 proclamation and the other measures.[51] Mandatory judicial review would preserve the separation of powers while ensuring timely rights protection.

Second, personal incarcerations and preventive systems require external controls. The literature will propose the presence of independent judicial or quasi-judicial overseeing units that will assess preventive detention orders at a normal and timely rate. This can in practice be an extension and empowerment of advisory or review boards of retired judges and independent experts and the formation of regional panels in such a way that the hearings are not delayed by their being centralized. Recent domestic administrative trends, e.g., the creation of an extra advisory board to deal with preventive detention cases in Madurai to hasten investigations, indicate that there is a need and capability to have localized check systems that can accelerate the review process and minimize the negative effects of detention.[52] This would limit arbitrary preventive detention and still allow states the ability to respond in real emergencies through such institutional provisions and statutory authority to conduct periodic judicial review.

Third, intellectual protection has to be refined. Essentially, courts ought to explicitly

[51] Anuj Bhuwania, Judicial Review and Emergency Powers in India, 34 Const. Comment. 55, 61–63 (2019)
[52] Amnesty Int'l India, Treated with Indifference: The Use of Preventive Detention Laws in India (2021)

address some of the values in the constitution, e.g., human dignity and personal liberty, as non-derogable cores, and put a ruthless proportionalist test whenever emergency-type measures are mentioned. Dilating judicial use of the Basic Structure doctrine to include efforts to invoke emergency powers in order to undermine the basic constitutional identity would offer a backstop against abuse on the doctrinal level. The basic-structure scholarship tracks the history of the basic-structure jurisprudence in issuing the doctrine a check upon amendment and emergency powers, and theorists have speculated that the doctrine can be applied to prevent emergency encroachments, which in effect undermine constitutional necessities.[53] A clearer proportionality scheme, with things that demand the government to demonstrate necessity, reasonableness, least-restrictive measures, and a very firm time-box, will provide courts with a real basis in evaluating claims by the executive rather than abiding by generalized national security claims.

Fourth, comparative institutional practices provide definite design options. In the US, India can take the concept of statutory reporting and congressional control of presidential emergency proclamation (e.g., the reporting requirements of the NEA) to develop open legislative review feedback loops that are effective even in times of crisis.[54] Germany provides a healthy model of advantages of a constitutional non-derogability (a so-called eternity clause) and a Federal Constitutional Court with the authority to invalidate initiatives that infringe on fundamental constitutional identity. The incorporation of these aspects, such as parliamentary review, non-derogable cores that are pre-specified, and a robust constitutional court, would help India to increase its structural resilience.

Fifth, criminal and preventive law reforms are important at the procedural level. Restricting statutory definitions (in UAPA and comparable statutes), reinforcing presumptions concerning bail, providing quick access to counsel and evidence, and statutorily providing that long detentions should be reviewed by a court of law are feasible changes to the law that have been proposed both in scholarly and human-rights reports.[55] These reforms reduce the risk that preventive law becomes de facto punitive in

[53] Madhav Khosla, The Basic Structure Doctrine and the Limits of Constitutional Amendment in India, 8 Int'l J. Const. L. 356, 370–72 (2010)
[54] Patrick Thronson, Toward Comprehensive Reform of America's Emergency Law Regime, 46 Mich. J. Int'l L. 229, 243–45 (2014)
[55] Human Rights Watch, Stifling Dissent: The Criminalization of Peaceful Expression in India (2016), https://www.hrw.org/report/2016/05/25/stifling-dissent/criminalization-peaceful-expression-india; Gautam Bhatia, Preventive Detention and the Constitution: A Reassessment, 62 J. Indian L. Inst. 89, 96–98 (2020)

the absence of conviction and help prevent selective enforcement against minorities and dissenters.

Finally, implementation requires political will and calibrated sequencing: doctrinal changes expanded basic-structure reasoning, clearer proportionality standards should be coupled with statutory and administrative reforms i.e.time-bound review rules, oversight boards, and expedited hearing procedures. These measures convert judicial vigilance from episodic intervention into a predictable, institutionalized system of constraints, one that preserves executive capacity to respond to real emergencies while protecting constitutional rights and democratic structure.

6. Conclusion and Suggestions

The constitution of India grants an extraordinary and exceptional power to the executive in articles 352 356 and 360 and the Emergency of 1975 is the most powerful reminder of how such power can be seized when the judicial restraint, the political weak point, and the institutional silence meet. The fact that civil liberties were suspended at that time, and the judiciary was unable to put forth constitutional boundaries, revealed the sheer vulnerability of the Indian emergency architecture. Despite the fact that the post-1977 developments, most notably, Minerva Mills, the reestablishment of the Basic Structure doctrine, and the transformative developments brought about by the Forty-Fourth Constitutional Amendment were meant to help the system address these weak points, they have never been effective enough to help the system overcome the relapse of the emergency-style governance. Modern tendencies to include extensive preventive detention, extensive anti-terror laws, the routinisation of Section 144 orders, and frequent internet blockades show that emergency rule logic and impact can now be duplicated without any pronouncement, often by everyday lawmaking and executive discretion. This is a minor change of a formally-proclaimed emergency into a legislative-administrative emergency, which normalizes the exceptional.

Comparative constitutionalism is focusing on the fact that the other democracies have been aggressive in establishing structural protection mechanisms to avoid such normalisation. The National Emergencies Act of the United States is combined with the regular congressional review and restrictions of the powers of presidential staff on demand. Germany enshrines non-derogable rights in the Basic Law and gives the Federal Constitutional Court the power to consider legislation that deals with crises by reference to inflexible proportionality. These

examples suggest that constitutional democracies are able to allow strong state intervention during a crisis, and both emergency powers can be temporary, accountable, and limited by law. But the safeguards have not been institutionalised systematically, so in India, judicial review is haphazard, there is little meaningful control over Parliament, and emergency powers of the executive are often invoked in a veil of secrecy. The wavering action of the judicial system, at times aggressive, but more often docile or tardy, also shows the indecisive struggle of the civil rights and executive claims.

Here, the threat of executive overreach, discrimination in particular groups of vulnerable, and the undermining of core freedoms when faced with crises is not a hypothetical fear but an ongoing reality of institutional life. India needs a complete structural redress of the emergency governance structure to ensure that the executive does not usurp constitutional supremacy in times of emergencies. One of the key reforms should be the constitutionalisation of the obligatory, time-limited judicial review of any emergency or an emergency-like declaration, which would compel the Supreme Court to re-examine the validity, proportionality, and need of any such measures within a given time span, preferably 60-90 days. This would form an automatic constitutional protection as opposed to ad hoc litigation or judicial activism. Also, India requires a decentralised review mechanism that is institutionalized. Setting up an independent or quasi-judicial regional body with legal support would mean that regular, clear, and open examination of preventive detention orders and crisis-time restraint would be carried out. These bodies can greatly lower the adjudicatory backlogs, curb misuse of the laws of detention to achieve political or communal persecution, and offer prompt redress to the victims since they might not be able to access the superior courts. Re-enacting the doctrinal underpinnings of the emergency jurisprudence of India is also crucial. A consistent legal boundary that even in times of national crisis cannot be suspended would be offered by the identification of some constitutional values, i.e., human dignity, right to due process, personal liberty, and fundamental aspects of Articles 14, 19, and 21 as explicitly non-derogable values. Additional incorporation of a proportionality review as a compulsory and formal examination in any case of litigation concerned with an emergency would aid courts in determining whether any executive action is genuinely required and the minimum restrictive method.

India can borrow the international experience by carrying out statutory reporting and regular parliamentary review to enforce institutional checks to curb the emergency powers, similar to the National Emergencies Act of the United States, hence providing some democratic control

over the emergency powers. Experiences of the German constitutional model, including its deeply rooted non-derogable constitutional rights and strict judicial scrutiny of crisis action, show how a constitutional system can continue to promote democratic values when under extreme pressure. The reforms should also be preventive and focused on tightening the loose statutory definitions in laws such as the UAPA, fortification of the rights in procedures such as a right to bail, provision of prompt access to competent legal counsel, disclosure of evidence, and forcing the periodic review of all detentions by the judiciary. These safeguards would ensure that preventive detention remains an instrument of long and punitive confinement.

Finally, the emergency governance framework must become resilient and, in that, a mix of doctrinal, statutory, and administrative changes is necessary. India needs to go beyond reactive, case-by-case judicial interventions to establish a proactive and institutionally-enforced system of checks and balances that will allow the avoidance of the recurrence of past abuses and permit state action in times of real emergencies. These reforms should be incorporated into ensuring that extraordinary powers are extraordinary, accountable and constitutional. It is only in such a total restructuring of India that the democratic institutions can be enhanced, the fundamental rights well protected, and no future emergency, whether formal or informal, can weaken the pillars of the commitments made by the Constitution.