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Emergency Powers In Federal Constitutions: A Comparative Study Of India, Usa, And Germany

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Abstract

Emergency powers are a paradox in the constitution where the power of democratic federations is momentarily centralized, to save the state, and at the expense of the very freedoms they are supposed to defend. The current comparative analysis of the constitutional system regulating emergency powers in India, the United States and Germany compares the historical development of laws, the legal mechanism, judicial control, and practice of these laws. The analysis of the doctrines and the comparative approach to examine the topic shows that there are major differences between the explicit and quite often invoked emergency provisions in India and the implicit emergency doctrine of the USA and the model of the restrictive defensive democracy used in Germany. The research shows that the constitutional design, the past experience of authoritarianism, and the effectiveness of the judicial review play a pivotal role in determining whether the emergency powers are used as the protective means or as the means of constitutional undermining. Such results have a place in constitutional theory because it sheds light on how federal regimes strike between crisis management and democratic preservation as a guide to constitutional drafters in new democracies struggling with balancing the state security and civil liberties.

Keywords

Emergency Powers, Federal Constitutions, Comparative Constitutional Law, Judicial Review, Civil Liberties

1. Introduction

Emergency powers have been the most longstanding issue in the governance of democracy through its constitutional accommodation. The important inquiry as Carl Schmitt has made famous is who holds power when a constitutional crisis occurs, that is, who decides on the exception[1]. With federal systems, this is especially complicated because emergency powers inevitably interfere with vertical distribution of authority between central and regional governments itself, which is the nature of federalism.

This comparative analysis looks at the three leading federal democracies, which are India, the United States, and Germany, and each is a possible model of how constitutional emergency powers should be exercised.

[1] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press, 1985), 5.

The Constitution of India is explicit in detailing broad emergency powers; the US of implied presidential powers built over historical experience and judicial case law; the German Basic Law, created in the wake of the failure of the Weimar system, creates a restraining model in which constitutional continuity will be valued. These different models come about as a result of distinct historical paths and provide useful insights on how to design a constitution.

The study will answer three key questions, namely: (1) How do federal systems organize emergency powers in their constitutions and judicial principles? (2) How can executive overreach in case of emergencies be avoided? (3) To what extent do these structures find the balance between crisis management and democratic preservation? This study throws some light on the issue of emergency powers and constitutional democracy through the analysis of the constitutional provisions, landmark judicial rulings and the use of these powers in the past.

2. Theoretical Framework: Emergency Powers and Constitutional Democracy

Emergency powers are inherently in conflict with constitutional government. Constitutions in modern times generally reflect institutionalized and predictable distributions of power to inhibit tyranny by the separation of power, federalism, and the protection of rights. Emergencies are by definition situations that require fast and focus attention that breaks these arrangements[2].

Constitutional emergency regimes were characterized by Clinton Rossiter as having four basic traits: extraordinary circumstances have to be present; special measures have to be transient; emergency operations should be directed at the restoration of normalcy; and there has to be some constitutional leftover[3]. The literature of the present-day stresses two opposing paradigms: the so-called accommodation model, which considers explicit emergency clauses to be safety valves ensuring that extra-constitutional action is prevented, and the so-called business as usual paradigm, which doubts the possibility of the extra-constitutional action to be justified by any means[4].

Federal systems bring in more complexity. Federalism is the division of sovereignty between central and constituent units, with the formation of several centers of authority. The emergencies are usually centralized in their response leading to pressure giving way to unitary governance which can forever change the balance in the federal. How constitutions negotiate this conflict brings into focus some basic beliefs regarding the state power, democratic accountability and the strength of federal organization.

3. India: Explicit Emergency Architecture

3.1 Constitutional Framework

The Indian Constitution includes the most extensive specific emergency provisions of the major democracies, which are described in Part XVIII (Articles 352-360). There are three categories, namely:

National Emergency (Article 352): It is declared when the security of India or any of its parts is at stake because of war, external aggression or armed rebellion. In case of a national emergency, the federal organization will practically be converted to a unitary one, as Parliament will have powers to legislate on behalf of states in areas that are traditionally their domain, and basic rights in Articles 19 (freedom of speech, assembly, movement) can be suspended[5].

[2] Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press, 1948), 5-11.
[3] Ibid., 297-306.
[4] Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), 17-89.

[5] Constitution of India, 1950, art. 352.

President Rule (Article 356): It can be applied in case there is a breakdown of constitutional machinery in a state enabling the central government to take over the functions of the state. This provision is usually aroused by a report of the Governor, which transfers both legislative and executive power to Parliament and the President respectively under the Governor.

Financial Emergency (Article 360): Applied in cases where the financial stability of India is at risk or the credit conditions, which grants the central government the authority to give financial directions to the states and cut the wages of the state employees.

3.2 Historical Application

India has declared national emergency on six occasions, most notoriously in the period between 1975 and 1977 under Prime Minister, Indira Gandhi. This emergency was first declared on grounds of internal unrest, it suspended civil liberties, arrested the opposition leaders, blocked press freedom, and delayed elections[6]. The controversial ruling made in ADM Jabalpur v by the Supreme Court. Shivkant Shukla (1976), who believed that fundamental rights might be wholly suspended in times of emergency, was a low point in the Indian constitutional jurisprudence[7].

Article 356 has been quoted more than 125 times since 1950, often in a partisan political context, and not as a serious disintegration of constitutional structure[8]. States controlled by opposition parties were the focus of unequal central intervention, which concern the issue of emergency powers as a tool of political control.

3.3 Judicial Evolution and the 44th Amendment

Overindulgences of the Emergency brought about great constitutional change. In 1978 the Constitutional Amendment of 44th amendment, Article 352, changed the terms of Article 352, substituting internal disturbance with armed rebellion, and written advice on the Cabinet instead of a simple recommendation by the Prime Minister was required to proclaim. More importantly, it safeguarded the right to life and individual freedom (Article 21) even in the time of emergency.

Judicial oversight was enhanced by post-Emergency jurisprudence. In S.R. Bommai v. Union of India (1994) found Article 356 justiciable and that the satisfaction of the President in the proclamations must be founded on objective material and the same may be reviewed by the courts[9]. The Court found some examples of cases when the President Rule was constitutional (external aggression, internal subversion, physical breakdown) and some cases when it could not be used (partisan goals).

Concerns have not stopped even with reforms. In 2016 study Article 356 invocations were associated with central-state political divergence significantly more than with objective governance crises[10].

[6] Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press, 1999), 312-345.
[7] ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207 (India).
[8] Rekha Saxena, "Presidents' Rule in India: An Empirical Assessment," *Journal of Federal Studies* 12, no. 4 (2012): 89-107.
[9] S.R. Bommai v. Union of India, (1994) 3 SCC 1 (India).
[10] Mahendra Pal Singh, "Abuse of Article 356 and the Bommai Judgment," *Economic and Political Weekly* 51, no. 48 (2016): 32-37.

4. United States: Implicit Emergency Powers

4.1 Constitutional Framework

In the U.S. Constitution, there is no full-fledged power of emergency. Crisis related powers are apparently diffuse: Congress is permitted to suspend habeas corpus when there is a Case of Rebellion or Invasion in the public Safety may require it (Article I, Section 9); the President as Commander-in-Chief (Article II, Section 2); and the power of war declaration is delegated to Congress (Article I, Section 8).

The presidential emergency powers have grown mainly by historical practice, delegation by law as well as judicial acquiescence. This system was attempted to be organized under National Emergencies Act (1976) that required presidential emergency declarations to mention invoked statutory powers and providing congressional review procedures[11]. As of now, 40 proclaimed national emergencies are still in place, the authorizations being scattered across more than 150 statutory provisions.

4.2 Historical Applications and Judicial Response

The issue of emergency powers has been a source of constitutional controversy across the American history. President Lincoln had declared the suspension of habeas corpus, declared martial law and sanctioned military tribunals of civilians under the claim of inherent executive authority during the Civil War. Ex parte Milligan (1866) by the Supreme Court denied civilians in areas with civil courts military trial and this set a precedent in limiting constitutional boundaries in times of crisis that would endure over time[12].

The effect of World War II was the creation of Korematsu v. United States (1944) affirmed Japanese-American detention- a ruling that came to be established as a serious mistake (referred to as a grave error)[13]. The case explains why judicial deference can be dangerous in the case of emergencies when civil liberties protections are at their greatest need.

The era of post-9/11 was characterized by large-scale emergency claims: the detention without trial in Guantanamo Bay, the use of enhanced interrogation programs, and high surveillance levels. The Guantanamo trilogy Rasul Bush v. Rasul. Bush (2004), Hamdi v. Rumsfeld (2004), and Hamdan v. Rumsfeld (2006)—disavowed the allegation of unreviewable executive authority, that even in wartime, enemy combatants in custody can invoke habeas corpus rights as well as protection under the Geneva Convention protections[14].

4.3 Structural Constraints

The American system holds on the separation of powers strongly instead of displaying emergency provisions. Theoretically, Congressional war authority, control of appropriations and oversight process limits executive emergency activities. Judge review, in spite of there being examples of overly deferential judicial review, gives much-needed accountability.

The Youngstown model as stated in Youngstown Sheet and Tube Co. v. Sawyer (1952) is still a fundamental one. The concurrence of Justice Jackson created a three-level analysis where the presidential power is optimally exercised when they operate within the powers of the Congress, in the realm of twilight when the Congress is silent and at its lowest point when they are exercising the power against the will of the

[11] National Emergencies Act, 50 U.S.C. § 1601 et seq. (1976).
[12] Ex parte Milligan, 71 U.S. 2 (1866).
[13] Korematsu v. United States, 323 U.S. 214 (1944); *Trump v. Hawaii*, 585 U.S. ___ (2018) (overruling Korematsu).
[14] Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

Congress[15]. This paradigm exposes the paradigm of emergency executive actions to situational analysis, but not categorical approval.

Nevertheless, the system has modern challenges. Statutory emergency authorities have been multiplied uncritically, resulting in what scholars call a parallel emergency constitution, only too little noticed by ordinary citizens[16]. There is more and more blurring of the line between the emergency actions and the permanent security states.

5. Germany: Defensive Democracy and Restrictive Emergency Law

5.1 Constitutional Framework

The German basic law (Grundgesetz) is imbued with lessons that the emergency facilitated by the Weimar government had left behind during the transition to the Nazi dictatorship. The Weimar Constitution in article 48 allowed the President to suspend basic rights during times of emergency and Hitler used the ability to create the totalitarian regime after the Reichstag fire[17].

There is no general emergency provision contained in the Basic Law. Rather it creates the so-called defensive democracy (Wahrhaftig Democratise) a constitutional system that is vigorously defending itself against anti-democratic elements without offering emergency authority. Key elements include:

Federal Constitutional Court Authority: Article 21(2) allows that political parties that seek anti-democratic objectives should be banned, and the matter must be adjudicated by the Constitutional Court. The Court has exercised this authority infrequently and only the Socialist Reich Party (1952) and Communist Party (1956) have been outlawed[18].

Emergency Amendments (1968): After a long debate the 17th Amendment added a limited number of emergency clauses without repeating the threat of dangerous power concentration to which Weimar had brought. These include:

External Emergency (Verteidigungsfall, Article 115a-l): Coming into effect when armed assault occurs or when an assault is threatened, joint committees of Bundestag and Bundesrat are empowered to promulgate expedited legislative authority when Parliament is incapable of meeting. At that, even then the Federal Constitutional Court is still working, and the basic human dignity (Article 1) is not a violated notion.

Internal Emergency (Innerer Notstand, Articles 87a, 91): allows the federal intervention in the case of insurrection against a Land endangering the democratic order, which cannot or will not deal with the situation. Federal armed forces could only be deployed on request of Land government or in cases where federal consent is needed[19].

[15] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring).
[16] Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," *University of Pennsylvania Journal of Constitutional Law* 6, no. 5 (2004): 1001-1083.
[17] Horst Dreier, "Weimar as a Model for the Emergency Powers in the Basic Law," *German Law Journal* 12, no. 1 (2011): 182-197.
[18] Basic Law for the Federal Republic of Germany, 1949, art. 21(2); BVerfGE 2, 1 (SRP ban); BVerfGE 5, 85 (KPD ban).
[19] Basic Law for the Federal Republic of Germany, arts. 87a, 91, 115a-l.

5.2 Practical Application and Judicial Oversight

Since the enactment of the Basic Law, Germany has never made the declaration of Verteidigungsfall. The COVID-19 pandemic was handled in the regular legislative procedures instead of crises proclamations, which proved that the system was capable of handling crisis without constitutional normalcy suspension.

Close monitoring is played by the Federal Constitutional Court. The Court in the Aviation Security Act Case (2006) invalidated a legislation that gave military aircraft the right to shoot down hijacked civilian airliners that may act as weapons on the ground, as the Court believed that the state could not kill innocent people with the intention to save more lives[20]. The case is an example of the German compliance with absolute human dignity protection under any emergency conditions.

The restrictive nature of the Basic Law is based on the historical experience of what a grant of emergency power can be taught, namely it cannot be substantially limited. The German constitutional design focuses on how to stop crises by strong democratic institutions as opposed to how to adjust them by exceptional powers.

6. Comparative Analysis

6.1 Constitutional Design Philosophy

The three systems represent different constitutional philosophy on emergency powers. India embraced explicit and comprehensive emergency solutions to its own post-colonial state-building priorities and perceived internal/external threats to security. The framers thought that a clear constitutional authorization would direct the management of any crisis by law and not extra-legal action[21].

Unconstitutional ambiguity and historical accretion propelled the United States to implicitly emerge with emergency powers, which was a product of the deliberations choosing executive power during the founding period and remained a dispute between presidential prerogative and legislative power. Such a method allows flexibility but can run the risk of inconsistent application and lack of constraint.

The restrictive structure of Germany comes as the direct outcome of the terrible experience of the Weimar, where the focus of the management was laid on the prevention of the emergency dictatorship, rather than the effectiveness in managing the crisis. The limited emergency measures prescribed in the Basic Law are a factor of calculated judgment that the concentrated powers of crises represent a threat to democracy even more than the absence of such powers.

6.2 Federal-State Relations During Emergencies

Federal balance is completely changed by emergency powers. This national emergency of India turns the federation into a quasi-unitary system the central government has taken over the legislative powers of states and, in effect, made itself give orders to suspend federalism until emergency suspension. This is indicative of the centralization aspect of Indian federalism, that is at times described as being quasi-federal[22].

The American emergency practice is more resilient in the federal level. Though the powers of the president increase when the nation is facing a crisis, the powers of the state continue to exist. States still had a lot of power in COVID-19 responses, and their application of the public health measures was varied, which proved the ongoing federalism. But the Supremacy Clause provides pre-emption of conflicting state law by the

[20] BVerfGE 115, 118 (Aviation Security Act Case, 2006) (Germany).
[21] B. Shiva Rao, *The Framing of India's Constitution: Select Documents* (Indian Institute of Public Administration, 1968), vol. 3, 524-547.
[22] K.C. Wheare, *Federal Government*, 4th ed. (Oxford University Press, 1963), 28.

federal action, and the power to combine federal spending allows central coordination even in the absence of direct command authority.

The structure in Germany is of a federal nature even when there is internal crisis as the Land government must consent to federal military action within the territorial boundaries of a state. This signifies the great adherence to federalism (Bundesstaatsprinzip) in the Basic Law as a constitutional principle that is not easily changed during the case of emergency.

6.3 Judicial Review Mechanisms

The strong judicial review is the most important way of interpreting emergency powers as constitutional protection and an authoritarian tool. Each of the three systems theoretically registers emergency actions under judicial review, but the level of effectiveness significantly differs.

Firstly, the judiciary in India failed this test miserably with the Emergency of 1975 but after the Emergency, the jurisprudence became much more robust. The justiciability determination made by the Bommai decision and the doctrine of basic structure contained in Kesavananda Bharati restricting even constitutional amendments give adequate restraint[23]. Nonetheless, there remain fears of judicial jingoism towards undermining the national security measures.

It has long been the pattern of American courts to be excessively deferential during times of emergency (Korematsu) and then to right afterwards. According to Youngstown framework and recent Guantanamo cases, the judiciary can reasonably limit the executive powers of emergency, but it requires that the judgment operate effectively by the judiciary in the face of crisis where the popular and political appeal is in favour of security and not liberty.
The Federal Constitutional Court in Germany has the longest history of successful oversight, as it has repeatedly upheld the fundamental rights even in times when there is an emergency. The inclination of the Court to strike down security laws clearly shows that the best way to have effective judicial review is to have a strong constitutional text and institutional independence.

7. Quantitative Comparison

Figure 1: Emergency Declarations and Duration (1950-2024)

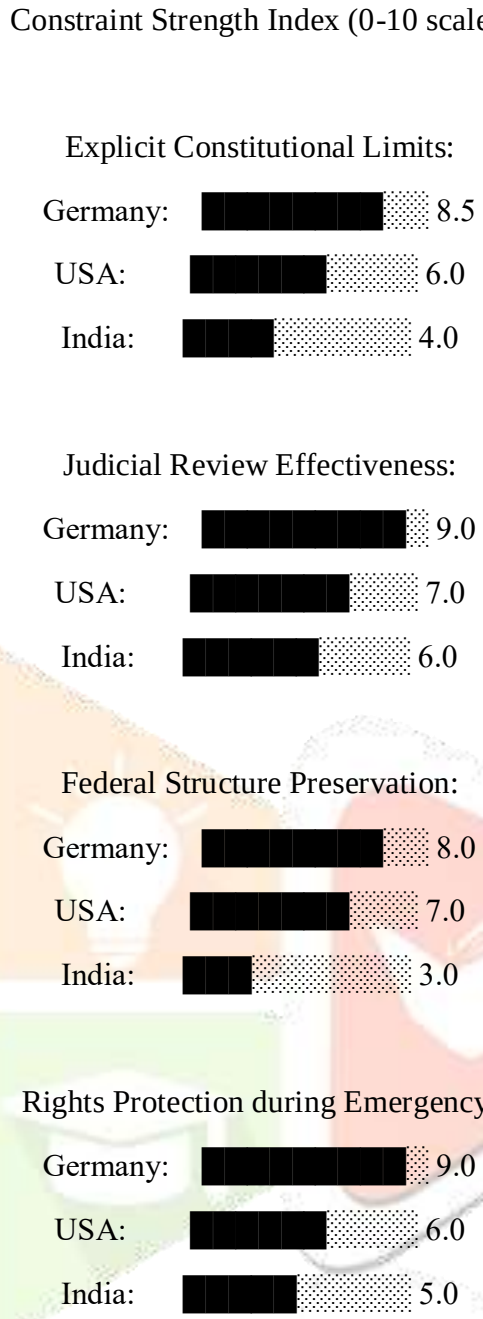
Emergency Invocations by Country:

Country	Type	Frequency	Average Duration	Longest Duration
India	National Emergency	6	29 months	21 months (1975-77)
India	President's Rule	125+	8 months	73 months (J&K, various)
USA	National Emergencies Act	79 declared (40 active)	Indefinite (many)	44+ years (Iran, 1979-present)
Germany	Verteidigungsfall	0	N/A	N/A

Sources: Ministry of Home Affairs (India); Federal Register (USA); Federal Ministry of Interior (Germany)

[23] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India).

Figure 2: Constitutional Constraints on Emergency Powers



Scoring methodology based on constitutional text analysis, historical application patterns, and scholarly assessments

The statistics are startling trends. The comparison of Germany as not using emergency provisions and India as invoking it many times and America proliferating emergency declaration is very contrasting. This implies explicit emergency powers, and not the inhibition of extra-constitutional action, may in fact encourage the government to resort to extraordinary action.

8. Critical Lessons for Constitutional Design

8.1 The Paradox of Explicit Emergency Provisions

The experience of India would imply that explicit, comprehensive emergency supplies, instead of introducing crises management in the form of a statute, can render to legitimize excessive government authority. The mere fact that Article 356 exists, seems to have prompted its partisan abuse, where more than

90 examples have been witnessed in the first forty years where most of them lacked real constitutional failure[24].

On the contrary, explicit provisions allow judicial review as they have textual standards to be used. Germany shows that emergency provisions that are formulated with careful attention, have severe restrictions, have powerful supervision and absolute protection of essential rights can work well however not without strong institutional restrictions.

8.2 Judicial Independence as Essential Safeguard

All three systems attest that constitutional text will not be enough to protect against the abuse of emergency powers. Effective constraint demands truly independent courts that are ready to impose constitutional restrictions at the same time when the political branches of government most strongly oppose constraint.

The ADM Jabalpur case of the Indian Supreme Court and the Korematsu case of the American courts explain disastrous failure in situations where the judiciary oversights too much in favour of the executive emergency assertions. The opposite history in Germany indicates that the courts can effectively defend the rights in times of crisis but it takes a sound constitutional framework and institutional boldness.

8.3 Sunset Provisions and Periodic Review

The history of the USA with constant national crises proves the necessity of the use of mandatory sunsets. The review mechanisms of the National Emergencies Act are not effective in practice -Congress has never voted down a presidential declaration of emergency using a joint resolution[25].

The amendments of the Indian constitution that demand the parliamentary consent on extending emergency beyond the stipulated times are partial solutions, but the 1975 Emergency demonstrated that those can be misused. The approach of Germany, coming up with institutions which can respond to issues of crisis without declaring an emergency, can eventually serve more robust protection than the time-limited emergency powers which are likely to become permanent.

9. Contemporary Challenges: Pandemics, Terrorism, and Digital Surveillance

The 21st century is the era of emergency cases that are awkward to the traditional constitutional systems. The COVID-19 stutter demanded the long-term action of governments in all three countries, which put emergency power doctrine to the test.

Instead of constitutional emergency powers, India appealed to Epidemic Diseases Act (1897) and Disaster Management Act (2005), and showed some preference to statutory emergency powers in case of a public health crisis than constitutional ones[26]. The Supreme Court has examined the measures of lockdown in terms of proportionality and protection of rights, although it mostly leaves the expertise of the executive on the issue of public health.

Pandemic management in the United States resulted in fragmented federal-state responses in the absence of national emergency declaration, but previous disasters (public health infrastructure declared in 2000) gave rise to statutory authorities. This brought out the resilience of the federal system and the challenges of coordination in times of crisis nationwide.

Germany dealt with the pandemic mainly by the standard legislative procedures with strong Constitutional Court controls. The Court invalidated elements of COVID limitations that breached proportionality

[24] Saxena, "Presidents' Rule in India," 95-98.
[25] Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *The Atlantic*, January/February 2019.
[26] Epidemic Diseases Act, 1897 (India); Disaster Management Act, 2005 (India).

imperatives and affirmed essential facets of safeguarding public health, and these outcomes showed that crisis management ought not to eliminate constitutional normalcy[27].

There are current issues with terrorism and digital surveillance. Security measures that were introduced in the three countries after 9/11 under the pretext of emergency have become a permanent aspect, and the question has been whether emergency powers can ever be sunset with security infrastructures established.

10. Conclusion

In this comparative work, the constitutional emergency powers exposed have long-term conflicts between effective crisis management and democracy. Three key findings emerge:

First, even a clear and extensive supply of emergency, as in the case of the constitutional system in India, does not always stop the exploitation, but more power may encourage governmental abuse through the legalization of extraordinary powers. The emergency invocation in India is very high in comparison with India where no restrictions have been used at all in Germany and this indicates that availability stimulates use.

Second, effective judicial review is the important limitation on the abuse of power in the case of emergencies. Inherent text of the constitution is not enough of protection, effective limitation needs truly an independent court that are ready to exercise constitutional limits in time of crisis when the political pressures incline to favor executive action. The fact that significant limitations on emergency power can be enforced is showing up in the Federal Constitutional Court of Germany, which points to ADM Jabalpur in India and Korematsu in America, the repercussions of judicial inaction.

Third, the constitutional design is quite different on the resilience of federal structure during emergencies. The fact that India became a near unitary system in the case of national emergency reflects decisions involving central authority and America is more federal proves that there are alternative ways of crises management and that does not mean that crisis management should involve federal suspension as seen in the case of Germany where the federal system was maintained even during the period of limited emergency provisions.

The best constitutional scheme probably involves constrained, narrowly defined emergency authorities coupled with absolute guarantees against fundamental liberties, sunset, strong judicial scrutiny and institutional structure in which the goal of crisis prevention is more important than crisis accommodation. The German experience of the so-called defensive democracy, which was formed out of historical disasters, dictates that ensuring the continuity of the constitution may be a higher priority than efficiency in crisis management, and this can be especially applicable to new democracies that are under pressure to give wide-ranging emergency powers.

The future study needs to capture emergency powers in other federal regimes, especially in multi-ethnic federation where risk of emergency power is increased by the regional autonomy issues. Normative constitutional design suggestions would be reinforced through empirical studies into the real effectiveness of emergency declarations in dealing with crises as opposed to authoritarian consolidation. The need to learn how constitutional structures can support the required response to crises and still retain democratic governance is becoming more essential as the world faces pressures requiring extraordinary action by the government due to global challenges such as pandemics and climate change.

[27] BVerfG, Order of 19 November 2021 - 1 BvR 781/21 (Federal Infection Protection Act) (Germany).