



Emergency Power and Judicial Activism: A Comparative Legal Study

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ABSTRACT:

The research investigates how emergency powers interact with judicial activism through a study of various legal systems. The executive branch receives emergency powers during crises which include wars and natural disasters and pandemics because these powers enable government officials to exercise special powers that endanger basic human rights and democratic values. Courts practice judicial activism as they examine executive policies to safeguard constitutional rights. The research shows how courts in the United States India the United Kingdom and Germany handle judicial intervention during emergency situations. The research analyzes theoretical frameworks and landmark cases and emergency judicial review standards to demonstrate that effective crisis management requires a balanced system which safeguards civil liberties.

Keywords: Judicial Activism, Legal System, Courts, Examine, United States.

1. INTRODUCTION:

The area of emergency powers in constitutional law creates major disputes because it requires assessment between two pairs of competing interests' security versus liberty and executive power versus judicial limits. Historical records show that governments gained special emergency powers during times of crisis which resulted in lasting effects on civil rights and democratic systems of governance (Dyzenhaus, 2006). Emergency powers have been used throughout American history starting with Abraham Lincoln's habeas corpus suspension during the Civil War and continuing through current government actions against terrorism and pandemics which test basic constitutional democracy principles.

Judicial activists show their power through their judicial review of executive and legislative decisions because they want to invalidate those decisions. The activist judiciary serves as a

protector of constitutional rights when political forces increase and democratic protections begin to break down (Tushnet, 2003). The judicial system must balance two opposing forces because it needs to respect executive expertise while protecting constitutional rights against permanent loss from emergency executive actions.

The research paper compares different legal systems to find out how they handle emergency situations. The study explores judicial emergency power review through case law and constitutional frameworks from different legal systems to find best practices and warning examples which show proper judicial behavior during crisis situations.

II. Theoretical Framework and Literature Review

A. Conceptualizing Emergency Powers

Governments receive emergency powers which provide them with special legal rights that they can use during times of emergency when national security or public safety or public health systems face threats. Scholars have long debated whether such powers should be explicitly codified in constitutional texts or left to evolve through practice and judicial interpretation (Agamben, 2005). The constitutional model, which includes the emergency declaration procedures of Article 48 of the Weimar Constitution and Article 352 of the Indian Constitution, establishes specific guidelines for emergency declarations. The United Kingdom's Civil Contingencies Act 2004 demonstrates the legislative model through its statutory system which governments can use during emergencies.

The statement "sovereign is he who decides on the exception" which Carl Schmitt made in 1985 (Schmitt, 1985, p. 5) serves as the foundation for emergency power discussions because it defines which person holds crisis authority to stop all normal legal processes. Schmitt claimed that this power existed outside constitutional restrictions while scholars who defend legal boundaries during emergencies have disputed this claim (Dyzenhaus, 2006).

B. Judicial Activism: Definitions and Debates

The term judicial activism lacks a definite meaning but people understand it as judicial decision-making which exceeds basic legal rule application to achieve greater constitutional goals and public policy objectives (Kmieć 2004). The critics of activism argue that it enables judges to exceed their legitimate authority because judges who are not elected to office use their personal preferences to replace the will of the people. According to Dworkin 1996 the supporters of activism believe that this practice protects minority rights while defending constitutional standards against majority rule pressure. The emergency situation requires special importance

which Judicial activism achieves through its specific application. Oren Gross 2003 identifies three emergency judicial review approaches which operate according to two systems: "business as usual" maintains standard constitutional procedures whereas "accommodation" gives governments increased authority and "extra-legal measures" allows some emergency actions to occur outside legal boundaries which will undergo future assessment. The different judicial review models establish three levels of judicial activism which the courts use to assess executive power.

C. The Democratic Dilemma

The intersection of emergency powers and judicial review presents a fundamental democratic dilemma. The effective crisis response needs rapid decision-making capability which becomes restricted through excessive judicial control. The executive branch typically possesses superior information, expertise, and institutional capacity to address emergencies (Posner & Vermeule, 2007). The historical record shows that emergency powers which governments grant to themselves will expand throughout time because their initial limits become permanent operational standards (Scheppelle, 2004).

The judicial system needs to achieve two objectives because courts must respect executive authority while maintaining control over emergency powers to make sure that their usage remains restricted. The core research question of this comparative study investigates how different jurisdictions maintain balance between two opposing forces.

III. Comparative Analysis of Judicial Approaches

A. United States: Evolving Standards of Deference

The United States Supreme Court's approach to emergency powers has evolved through two extreme periods which showed complete judicial deference and strong judicial activism. The Supreme Court case *Korematsu v. United States* (1944) demonstrates the dangerous limits of judicial deference. The Court accepted the government's military necessity claim with little examination when it approved the Japanese American internment during World War II. Justice Black's majority opinion applied rational basis review because he declared that "pressing public necessity may sometimes justify the existence of restrictions which curtail the civil rights of a single racial group" (*Korematsu*, 1944, p. 216). The Supreme Court formally rejected this decision which has faced extensive criticism in *Trump v. Hawaii* (2018).

The period following the September 11 attacks saw the Supreme Court become more involved in its judicial functions. The Court determined that the government needed to prove its case when it attempted to prove its power to detain enemy combatants which it claimed existed without legal

oversight in *Hamdi v. Rumsfeld* (2004). Justice O'Connor's plurality opinion established an even system through which she explained that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" (Hamdi, 2004, p. 536). The Court established that detainees needed to receive both notice of their status and the chance to appeal that status because this process showed that courts could conduct actual judicial examination during times of war.

The Supreme Court found that military commissions which the president created through executive order in *Hamdan v. Rumsfeld* (2006) violated both the Uniform Code of Military Justice and the Geneva Conventions. Justice Stevens stressed that the Executive branch must follow the law according to his statement (Hamdan, 2006, p. 635). These decisions demonstrate a more active judicial approach which the Court uses to control presidential powers during national emergencies.

B. India: Expansive Judicial Review

The Indian Supreme Court has developed one of the most activist approaches to emergency powers worldwide. The Indian Constitution establishes three emergency types which include national emergency as defined in Article 352 state emergency which Article 356 describes and financial emergency which Article 360 outlines. The most notorious invocation occurred during the Emergency of 1975-1977 which Prime Minister Indira Gandhi used to suspend fundamental rights.

The Supreme Court's decision in *ADM Jabalpur v. Shivakant Shukla* (1976) represents the nadir of Indian judicial review. The Court established that citizens cannot access any court to protect their fundamental rights which include the right to life during emergency situations. This decision was widely condemned and is considered a "darkest hour" in the Court's history (Baxi, 2000).

Post-Emergency the Indian judiciary began to adopt an activist approach which marked its transformation. The 44th Constitutional Amendment (1978) introduced safeguards which restricted emergency powers by mandating written Cabinet advice during emergency declarations and protecting citizens' right to life and personal liberty throughout emergencies. The Supreme Court developed the "basic structure doctrine" in *Kesavananda Bharati v. State of Kerala* (1973) which established that certain constitutional features remain unchangeable during emergency situations while providing judicial limits to emergency authority.

The current Indian legal system shows strong judicial activism through its active judicial processes. The Supreme Court ruled in *S.R. Bommai v. Union of India* (1994) that judicial review

must examine emergency state proclamations under Article 356 because existing political question rulings prevented such review. The Court established substantive standards for reviewing emergency declarations by requiring governmental bodies to provide actual evidence of constitutional collapse instead of depending on executive power assertions (Bhagwati 1994).

C. United Kingdom: Balancing Common Law Principles and Statutory Powers

The United Kingdom does not have a written constitution that includes specific emergency rules which instead it depends on common law traditions and legal statutes. The Civil Contingencies Act 2004 establishes the main legal framework for emergency powers which requires parliamentary consent and sets time restrictions on emergency protocols. British courts have developed an increased tendency to evaluate executive decisions which occur during emergencies since the Human Rights Act 1998 brought European Convention on Human Rights into British legal practice. The House of Lords declared all parts of the Anti-Terrorism Crime and Security Act 2001 which permitted authorities to hold foreign terrorist suspects without trial indefinitely to be unconstitutional in *A v Secretary of State for the Home Department* 2004. Lord Bingham declared that "the real threat to the life of the nation" comes not from terrorism but "from laws such as these" (*A v. Secretary*, 2004, para. 97). This ruling demonstrates judicial activism which protects basic rights despite facing national security issues.

The UK courts have established a system for emergency measures, which requires proportionality review to determine whether emergency measures achieve their goals through necessary and suitable measures that do not surpass required limits. Lord Steyn established this standard in *R (Daly) v. Secretary of State for the Home Department* (2001) when he showed that proportionality review needs to assess how different interests and factors receive different levels of importance. The process establishes a more demanding review standard that exceeds what traditional reasonableness standards require.

D. Germany: Constitutional Constraints and the Militant Democracy

Germany utilizes emergency powers according to historical lessons which demonstrate that the Weimar Republic failed and the Basic Law requires its constitution to protect itself against attackers who misuse democratic rights. The Basic Law (Grundgesetz) establishes emergency situations through its three core emergency articles which create specific procedural requirements and operational boundaries. The Federal Constitutional Court (Bundesverfassungsgericht) has shown strong judicial activism when it assesses governmental actions which involve emergency situations. The Court found in the Aviation Security Act case (2006) that military authorities

lacked legal power to destroy hijacked aircraft which were being used as weapons because such actions breached the Basic Law's Article 1 protection of human dignity. The Court established that the state must not regard individuals as expendable resources during critical emergency situations (Bundesverfassungsgericht, 2006).

German constitutional doctrine recognizes that fundamental rights remain in force during emergencies because only Basic Law authorized restrictions can limit these rights at a level which matches the danger. The approach known as "constitutional hardening" prevents emergency powers from diminishing essential constitutional obligations (Schlink, 2010).

IV. Discussion: Patterns and Principles

The comparative analysis reveals several common patterns in judicial approaches to emergency powers. The courts which previously granted excessive power to presidents during national emergencies together with the U.S. Supreme Court in *Korematsu* and the Indian Supreme Court in *ADM Jabalpur* established more forceful judicial positions because their past experience with emergency power abuses shaped their approach to judicial power. Proportionality analysis has developed into the primary method which courts use to assess emergency measures across most legal systems in existence today. Emergency powers need to be essential and effective while staying within proper limits according to judicial requirements which use "narrow tailoring" in American constitutional law and "proportionality" in European legal systems and "reasonableness" in Indian legal systems (Stone Sweet & Mathews 2008).

The third point indicates that specific rights now receive permanent protection from violations which cannot be suspended during times of crisis. International human rights instruments together with domestic constitutional law protect the right to life and prohibition of torture and essential due process rights which restrict the extent of allowable emergency actions (International Covenant on Civil and Political Rights, 1966, Article 4).

The fourth point demonstrates that procedural safeguards which include temporal limits and legislative oversight and regular judicial review functions as an essential method to stop emergency powers from becoming permanent. The Basic Law of Germany demonstrates this method because it requires legislators to renew emergency declarations through scheduled processes while allowing constitutional challenges to proceed through established methods.

The patterns which researchers observed reveal that nations are developing a shared understanding about how judges should operate during emergency situations. Courts should

maintain their authority to review executive emergency actions while they assess whether these measures meet essential requirements and constitutional rights protection.

V. Conclusion

The need for effective crisis response conflicts with constitutional governance because emergency powers require judicial activism to protect individual rights and democratic values. The study demonstrates that judicial activism should not be interpreted as judicial interference which prevents courts from executing essential emergency procedures. The legislation establishes a framework which enables the judiciary to examine emergency measures through three essential criteria of temporary duration and balanced enforcement and constitutional adherence.

The United States and India and the United Kingdom and Germany show different ways to solve this problem because each country developed its own historical background and fundamental legal system. The U.S. Supreme Court's evolution from Korematsu's deference to Hamdi's balanced review; India's transformation after the Emergency; the UK's proportionality-based approach; and Germany's constitutional hardening all offer valuable lessons for maintaining rule of law during crises.

The judicial activism principles which must be established to handle emergency situations require three essential elements which include: (1) the protection of non-derogable rights which must remain intact throughout all emergency periods; (2) the use of proportionality analysis which must determine whether emergency measures achieve their needed purposes without going beyond required limits; (3) the application of sunset clauses which demand subsequent evaluations to stop temporary measures from becoming long-term solutions; (4) citizens must maintain their right to challenge constitutional matters through court access; and (5) institutions should study historical errors to build better systems which prevent future mistakes.

The primary purpose of judicial activism during emergency situations exists to protect democratic institutions through efficient crisis management. Justice Jackson explained in his Youngstown concurrence that "emergency powers operate under free government only when their control exists outside the Executive" (*Youngstown Sheet & Tube Co. v. Sawyer*, 1952, p. 652). The practice of judicial activism maintains vital governmental balance through its execution which protects constitutional democracy during the most challenging times

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