

Emergency Powers & Crisis of Constitutionalism

Introduction

Emergencies—whether wars, terrorist attacks, pandemics, environmental disasters, or financial crises—**demand swift and decisive state action**. Constitutions across the world acknowledge this by **granting extraordinary powers to governments**, often allowing them to bypass normal procedures in the name of survival.

Yet, this raises a fundamental dilemma: **how to empower the state to act effectively in emergencies without undermining constitutional democracy itself**. History shows that unchecked emergency powers can easily slide into authoritarianism, and what is justified as “temporary necessity” often becomes a tool of permanent control.

Thus, emergency powers occupy a paradoxical space—they are meant to **preserve the constitutional order**, but if abused, they **destroy its very foundations**.

The Architecture of Emergency Powers

Emergency powers lie at the uneasy intersection of constitutionalism and authoritarian temptation. **Constitutions, created to limit state power** and guarantee rights, **paradoxically** contain provisions that allow for their **suspension in times of crisis**.

This tension reflects **the need for the state to protect its very existence while also guarding against the permanent erosion of liberty**. Almost every modern constitution—whether written or unwritten—has grappled with this problem.

1. Suspension of Fundamental Rights

One of the most common features of emergencies is the **temporary suspension of civil liberties** such as freedom of movement, expression, association, and assembly.

The underlying rationale is that in moments of war, rebellion, or disaster, individual rights must give way to collective security.

- **India (1975–77 Emergency):** Under Article 352 of the Indian Constitution, Prime Minister Indira Gandhi declared a national emergency citing “internal disturbance.” This allowed the government to suspend **fundamental rights under Article 19** (freedom of speech, assembly, and movement).
- Habeas corpus petitions were denied in the infamous **ADM Jabalpur v. Shivkant Shukla (1976)** case, where the **Supreme Court held that even the right to life and liberty could be suspended during an emergency.**

2. Preventive Detention and Censorship

Emergency regimes often allow **detaining individuals without trial** and censoring media or communications. The justification is pre-empting threats before they materialize and preventing panic or sedition.

- **United States (World War I & II):** The **Espionage Act (1917)** and **Sedition Act (1918)** criminalized dissent against the war effort. Later, during World War II, **Executive Order 9066** authorized the internment of over 110,000 Japanese-Americans without trial, upheld by the Supreme Court in **Korematsu v. United States (1944).**

3. Expansion of Executive Authority

Emergencies frequently elevate the executive into the dominant branch of government, enabling unilateral decision-making and weakening legislative oversight.

- **France:** Article 16 of the **Fifth Republic’s Constitution** empowers the President to assume extraordinary authority when institutions are threatened. **Charles de Gaulle** famously invoked it in 1961 during the **Algerian crisis**, ruling almost by decree.
- **India:** Ordinance-making powers under **Article 123** were extensively used during the 1975 Emergency, bypassing Parliament entirely. Critics argue this reduced the legislature to a rubber stamp.

4. Emergency Decrees and Ordinances

Another hallmark of emergencies is **the use of decree powers that bypass legislative procedures**. These instruments allow executives to legislate directly, often without meaningful oversight.

- **Weimar Germany: The Reichstag Fire Decree (1933)** and subsequent **Enabling Act** gave Hitler authority to pass laws without parliamentary approval, marking the legal death of democracy.

Safeguards: Theory vs Practice

While constitutional designs attempt to limit abuses, reality often tells a different story.

- **Safeguards** typically include **time limits** (as in India, where emergencies must be renewed every six months), **legislative approval** (Germany's Bundestag must oversee Article 115 emergencies), and **judicial review** (courts in the U.S. can examine executive overreach).
- **Non-derogable rights** are enshrined in instruments like the **International Covenant on Civil and Political Rights (ICCPR, Article 4)**, which prohibits suspension of rights such as freedom from torture, slavery, or arbitrary deprivation of life.
- Yet, in practice, governments often **stretch definitions of emergency** (Indira Gandhi citing "internal disturbance"), **renew indefinitely** (Egypt's decades-long emergency), or **silence judicial review** (ADM Jabalpur in India, Korematsu in the U.S.).

Emergency Provisions in the Indian Constitution

The **Indian Constitution** contains one of the most elaborate and detailed frameworks for emergency powers among modern constitutions. These provisions were included by the Constituent Assembly with a dual purpose: **to ensure the unity and integrity of the nation in times of crisis, and to provide the state with sufficient authority to deal with extraordinary challenges** that ordinary laws could not address.

The provisions are contained primarily in **Part XVIII (Articles 352 to 360)**, supplemented by judicial interpretations and political practices that have evolved over time.

1. National Emergency (Article 352)

- **Grounds:** Article 352 empowers the President to declare a National Emergency if the security of India or any part of its territory is threatened by **war, external aggression, or armed rebellion**.
 - Originally, the word used was “internal disturbance,” but after the **44th Constitutional Amendment (1978)**, it was replaced with “armed rebellion” to prevent misuse.
- **Effects:**
 - Fundamental Rights under **Article 19** are automatically suspended during a National Emergency.
 - Other Fundamental Rights (except Articles **20** and **21**) can also be suspended by a presidential order under **Article 359**.
 - **The Union assumes overriding control over the states;** the federal structure is effectively transformed into a unitary one.
 - The life of the Lok Sabha can be extended beyond its normal five years for one year at a time.
- **Procedural Safeguards:**
 - **Written recommendation of the Union Cabinet is mandatory** before the President issues such a proclamation (added by the 44th Amendment to prevent unilateral prime ministerial action).
 - The proclamation must be approved by both Houses of Parliament within **one month**.
 - Renewal requires approval every **six months**.
- **Historical Use:**

- Declared three times: in **1962 (China war)**, **1971 (Indo-Pak war)**, and **1975–77 (political instability and alleged internal disturbance)**.
- The **1975 Emergency**, proclaimed by Indira Gandhi, remains one of the most controversial chapters in Indian democracy. Civil liberties were suspended, opposition leaders were jailed, and the press was censored. This led to the 44th Amendment, which significantly curtailed the possibility of future misuse.

2. President's Rule (State Emergency) (Article 356)

- **Grounds:** If the President is satisfied that the governance of a state cannot be carried on according to the provisions of the Constitution, he can impose President's Rule.
 - Often referred to as a "**constitutional breakdown**" in a state.
- **Effects:**
 - The state executive and legislature are dismissed.
 - Parliament assumes the powers of the state legislature.
 - The Union government directly administers the state through the Governor.
- **Approval & Duration:**
 - Must be approved by Parliament within **two months**.
 - Can continue for **six months at a time**, up to a maximum of **three years** (with conditions such as national emergency or Election Commission's recommendation).
- **Judicial Scrutiny:**
 - For a long time, Article 356 was misused for partisan purposes, often to dismiss opposition governments.
 - In **S.R. Bommai v. Union of India (1994)**, the Supreme Court held that the President's satisfaction under Article 356 is **not beyond judicial**

review. The Court asserted that the majority in the state assembly must be tested on the floor of the House, not decided by the Governor or the President.

- **Incidence:**

- Article 356 has been invoked over **125 times** since Independence, highlighting its frequent use as a political tool.
- After Bommai, its misuse has declined significantly, making Indian federalism more stable.

3. Financial Emergency (Article 360)

- **Grounds:** If the President is satisfied that the financial stability or credit of India (or any part of its territory) is threatened, a Financial Emergency may be declared.

- **Effects:**

- The Union government can direct states on financial matters.
- Salaries and allowances of all public officials, including judges, can be reduced.
- The President can reserve all money bills and financial bills for parliamentary consideration.

- **Approval & Duration:**

- Must be approved by Parliament within **two months**.
- Once approved, it continues indefinitely until revoked.

- **Usage:**

- Article 360 has **never been used in India**, although considered during the 1991 balance of payments crisis. Instead, India relied on IMF assistance and liberalization reforms to address the crisis.

4. Other Provisions Linked to Emergencies

- **Suspension of Fundamental Rights (Article 358 and 359):**
 - **Article 358:** During a National Emergency, freedoms guaranteed by **Article 19** are automatically suspended.
 - After the 44th Amendment, this applies only during emergencies declared on grounds of **war or external aggression**, not armed rebellion.
 - **Article 359:** The President may suspend the right to move the courts for enforcement of Fundamental Rights (except Articles 20 and 21).
- **Duration of Lok Sabha (Article 83):** During a National Emergency, the term of the Lok Sabha can be extended beyond five years.
- **Parliament's Power over States (Article 250):** Parliament gains the power to legislate on any subject in the **State List** during a National Emergency.

5. Safeguards against Misuse

The framers of the Constitution anticipated the dangers of such provisions and embedded checks. However, experience showed that safeguards were often inadequate, leading to later reforms:

1. **Cabinet Recommendation:** To prevent unilateral executive action, the 44th Amendment mandated written advice of the Council of Ministers.
2. **Time Limits:** Emergency declarations lapse unless approved by Parliament.
3. **Judicial Review:** The Supreme Court has asserted its authority to review the validity of proclamations under Articles 352 and 356.
4. **Parliamentary Approval:** Every extension requires legislative consent, keeping emergencies under political scrutiny.

The Normalization of Emergency

One of the gravest challenges facing constitutional democracies today is the **normalization of emergency logic**. Emergency powers, originally conceived as exceptional and temporary responses to crises, are increasingly woven into the

fabric of ordinary governance. This shift transforms democracies into regimes of “**permanent exception**”, where rights are provisional and executive discretion becomes routine.

Permanent Renewal of Emergencies

In many countries, temporary emergency proclamations are **renewed indefinitely**, eroding the boundary between crisis and normalcy.

- **Turkey** after the 2016 coup attempt declared a nationwide state of emergency, formally lasting two years, but its provisions—mass purges, media restrictions, and expanded presidential decrees—were effectively **absorbed into ordinary law** through constitutional amendments in 2017–18, cementing Erdoğan’s hyper-presidential system.

Broad and Vague Definitions of Threats

The **scope of emergencies** has expanded far beyond war, rebellion, or natural disaster. Governments now invoke emergencies for **ambiguous or low-threshold threats**, raising concerns about abuse.

- **India**, under Article 356 (President’s Rule), has seen repeated invocation of “failure of constitutional machinery” in states—often for political convenience rather than genuine breakdowns. Though the Supreme Court’s **S.R. Bommai (1994)** judgment curtailed this misuse, the precedent of broad discretion remains alive.

Absorption of Temporary Laws into Permanent Frameworks

A hallmark of normalization is when **temporary measures introduced during crises are quietly codified into permanent law**.

- After **9/11**, the U.S. **PATRIOT Act (2001)** introduced sweeping **surveillance powers**, justified as temporary tools against terrorism. Two decades later, despite sunset clauses, **most provisions either remain intact or were reincorporated** into other federal statutes, making mass surveillance a permanent feature of American governance.

Executive Centralization

Emergencies also **tilt the balance of power decisively toward the executive**, marginalizing legislatures and courts.

- In **Sri Lanka**, the presidency has repeatedly invoked emergency regulations (under the Public Security Ordinance) **to control protests, bypass parliamentary scrutiny, and restrict media**. The 2022–23 economic and political crisis saw the government ruling largely through emergency decrees.

Technology and the Digital State

States now deploy digital tools for surveillance, control, and administration under the justification of crisis management. This creates fresh **constitutional dilemmas** that differ significantly from classical emergency provisions.

Biometric and health tracking during pandemics

The COVID-19 pandemic highlighted how **biometric technologies and digital health monitoring** could be normalized under the emergency logic.

- Contact-tracing applications like **India's Aarogya Setu**, **Singapore's TraceTogether**, and the **EU's Digital COVID Certificate** enabled states to monitor mobility and interactions in real-time.

Mass surveillance and AI-driven policing

Post-9/11 counterterrorism provided the legal groundwork for extensive **digital surveillance regimes**. The U.S. **Patriot Act (2001)** authorized bulk data collection, later exposed by Edward Snowden in 2013, showing the extent of NSA surveillance.

Similarly, **China's "Sharp Eyes" program** and its **Social Credit System** merge facial recognition, big data, and AI to monitor citizens' behavior in real time, under the rationale of national security and social stability.

Digital censorship

Emergencies are also framed in **informational terms**, where states regulate digital communication under the pretext of safeguarding democracy. During the pandemic, **Australia's misinformation laws**, **India's IT Rules (2021)**, and the **European**

Union's Digital Services Act (2022) gave governments unprecedented authority to compel platforms to take down content deemed harmful.

Centralized digital IDs and governance

Emergency logic also finds expression in **centralized digital identity systems**. India's **Aadhaar**, the world's largest biometric database, initially promoted for welfare delivery, has been extended into financial services, voting debates, and even pandemic management.

During emergencies, such IDs can become tools of exclusion: migrants and refugees often face difficulties in accessing essential services when identity verification is digitized.

Similarly, the **European Union's plans for a Digital Identity Wallet** and Kenya's **Huduma Namba project** show how crises accelerate the adoption of **digital state infrastructures** that centralize data and control in executive hands..

Judicial Role: Guardians or Accomplices?

Courts are constitutionally designed to be the **ultimate guardians of rights and constitutional limits** during times of emergency. In theory, they stand as a check against executive overreach, ensuring that necessity does not erode the rule of law.

Yet, in practice, their record is deeply **ambivalent and uneven across jurisdictions**. Judicial behavior oscillates between courageous defense of constitutionalism and complicity in normalizing authoritarian measures.

Judicial abdication: The doctrine of necessity

Historically, many courts have **abdicated their role** by invoking doctrines of **necessity, deference, or political questions**, thereby insulating emergency powers from scrutiny.

- In **Pakistan**, the Supreme Court repeatedly legitimized military coups under the infamous "**doctrine of necessity**" (1954, 1977, 1999), arguing that survival of the state justified suspension of constitutional order.
- During India's **Emergency (1975–77)**, the Supreme Court in the infamous **ADM Jabalpur v. Shivkant Shukla (1976)** ruled that even the right to life

could be suspended, effectively abdicating its role as guardian of fundamental rights.

Judicial courage

At other moments, courts have demonstrated **remarkable courage** in resisting authoritarian overreach, reminding executives that constitutionalism is not optional even in times of crisis.

- The **German Federal Constitutional Court** has often acted as a bulwark, most recently in 2020 when it struck down indiscriminate mass data retention laws, emphasizing that even in counterterrorism contexts, privacy remains a constitutional guarantee.

Technocratic deference & The Doctrine of Scientific Necessity

A new pattern has emerged in the **digital and biomedical age of emergencies**, where courts increasingly **defer to technocratic claims** rather than purely political ones.

- During the **COVID-19 pandemic**, courts in countries like **France, Germany, and India** largely upheld lockdowns, travel bans, and digital contact-tracing mandates by invoking “scientific necessity” and expert advice.
- The **UK Supreme Court** in 2020 refused to overturn sweeping restrictions, citing the exceptional nature of the crisis.

The Crisis of Constitutionalism

Constitutionalism is often described as the idea that **government must be limited by law**, that **power should be exercised within a framework of checks and balances**, and that **citizens’ rights must be protected against arbitrary authority**.

At its heart lies the conviction that constitutions are not merely legal documents but **normative compacts**—they embody the values of freedom, accountability, and popular sovereignty.

The crisis of constitutionalism is not about the absence of constitutions—most states today have them—but about their **hollowing out** from within.

I. Understanding Constitutionalism and its Fragility

Classical constitutionalism envisioned a **division of powers, judicial independence, and protection of rights**. Modern constitutions added social justice, welfare guarantees, and participatory mechanisms. But these promises are constantly tested in times of crisis.

The fragility of constitutionalism stems from two contradictions:

1. Constitutions must **both empower and limit** state authority.
2. Constitutions must function in both **ordinary and extraordinary times**.

It is in the **moments of crisis**—war, terrorism, pandemics, or economic collapse—that **constitutionalism is most vulnerable**. Emergency powers, if unchecked, can transform constitutionalism into a façade, where the form remains but substance disappears.

II. Emergency Powers as the Breeding Ground of Crisis

Emergencies highlight the tension between **security and liberty**. Almost every modern constitution allows **temporary suspension of rights** or concentration of power in the executive. However, what begins as an **exception often becomes the new normal**.

- **India's Emergency (1975–77)** under Indira Gandhi showed how constitutional mechanisms could be legally used to suspend democracy, suppress dissent, and censor the press. Though democracy was restored, the episode left a permanent scar.

III. Populism and the Undermining of Constitutional Culture

Beyond moments of emergency, one of the gravest threats to constitutionalism today comes from the rise of **populist leaders** across democracies. Populism claims to embody the “true voice of the people” against entrenched elites, but in practice it often dismisses or undermines **independent institutions**—courts, legislatures, election commissions, and media—that are essential to constitutional democracy.

The paradox is that these leaders usually operate **within democratic forms**, winning elections and invoking popular mandates, while simultaneously hollowing out constitutional norms.

1. Systematic Restructuring of Institutions

- **Poland under the Law and Justice Party (PiS):** judicial reforms weakened the independence of the Constitutional Tribunal and ordinary courts, while state media was converted into a government mouthpiece. These steps undermined EU principles of rule of law, leading to unprecedented clashes between Poland and EU institutions.

2. The Attack on Institutions

- **India** illustrates how populism interacts with majoritarian interpretations of democracy. Debates about the autonomy of the **Election Commission**, the use of investigative agencies against opposition parties, and the dilution of federal balance between the Union and States have raised concerns about whether constitutional checks can survive against strong electoral mandates.

3. Populism as Justification for Authoritarian Practices

- In **Brazil under Jair Bolsonaro**, populist rhetoric about defending the people from corruption and crime was accompanied by hostility toward the judiciary, media, and civil society organizations. Bolsonaro frequently attacked the Supreme Court and the electoral commission, creating distrust in democratic processes even while functioning under a constitutional order.

III. The Hollowing Out of Constitutional Democracy

The **crisis of constitutionalism** does not always announce itself in spectacular coups, military takeovers, or dramatic suspension of constitutions. More often, it is a **slow, almost imperceptible erosion** of democratic institutions.

Political scientist Guillermo O’Donnell called this phenomenon the rise of “**delegative democracies**,” where formal institutions survive, but their substantive role is hollowed out.

This hollowing out manifests across multiple dimensions of governance:

1. Parliaments reduced to rubber stamps

Legislatures continue to meet, but their deliberative role declines sharply. Laws are increasingly passed **without meaningful debate or scrutiny**, often pushed through by strong executives using majoritarian dominance.

- In **India**, important legislations such as the **Aadhaar Act (2016)** and **Farm Laws (2020)** were passed with limited debate, raising concerns over parliamentary bypass.

2. Elections as rituals of legitimation

Elections continue to be held, but they become increasingly **unfree or unfair**, marked by harassment, delegitimization, or co-option of opposition.

- In **Zimbabwe** and **Uganda**, opposition parties face harassment, surveillance, and violence, even as regular elections are conducted.

3. Courts that defer rather than decide

Judiciaries continue to function, but they often **avoid core constitutional questions** or defer excessively to the executive in the name of stability, national security, or necessity.

- In **Poland**, judicial independence has been systematically eroded through reforms that **pack courts with loyalists**, yet the institution continues to exist formally.

4. Media under capture and manipulation

Independent media survives in name, but censorship, corporate concentration, or **algorithmic manipulation** curtails genuine freedom of expression.

- In **China**, censorship is direct and pervasive, with constitutional references to “freedom of speech” subordinated to party control.
- In **Russia**, mainstream media has been brought under state or oligarchic control, with digital platforms tightly regulated.

IV. Reclaiming Constitutionalism

The question, then, is how to reclaim constitutionalism in this age of crisis. Some strategies include:

1. **Reasserting Procedural Safeguards:** Emergency powers must be subject to judicial review, legislative renewal, and strict temporal limits.
2. **Protecting Non-Derogable Rights:** Certain core rights—such as protection from torture, arbitrary detention, or discrimination—should never be suspended, even in emergencies.
3. **Strengthening Constitutional Culture:** Beyond legal rules, citizens must internalize the values of dissent, pluralism, and accountability.
4. **Independent Institutions:** Electoral commissions, human rights commissions, and ombudsmen must be insulated from executive dominance.
5. **Digital Oversight:** Data protection, algorithmic transparency, and independent regulators are essential for constitutionalism in the digital age.
6. **Global Constitutionalism:** International norms, human rights courts, and transnational civic networks can provide external checks where domestic institutions fail.