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**EMERGENCY POWERS, EXECUTIVE AGGRANDIZEMENT, AND
DEMOCRATIC BACKSLIDING: WHEN CONSTITUTIONAL CHECKS
HOLD AND WHEN THEY FAIL**

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ABSTRACT

Constitutions anticipate emergencies, and most contain provisions permitting the suspension of ordinary limits on power when the state is threatened. The historical record shows that these provisions are used far more often against domestic political opponents than against foreign armies, and that the greatest danger to a constitutional democracy is not the emergency that is declared but the one that never ends. This article examines how courts and constitutional design have responded to that danger in three settings: the classic declared emergency, illustrated by India in 1975, the United States during wartime, and the United Kingdom after 2001; the "permanent emergency" through which Hungary, Turkey, and others have normalised extraordinary powers; and the aggrandizement of the executive through ordinary instruments such as executive orders and prorogation, illustrated by the United States and the United Kingdom. Drawing on *ADM Jabalpur*, *Korematsu*, *Youngstown*, *Hamdi*, *Boumediene*, the *Belmarsh* case, *Miller (No 2)*, *Trump v. United States*, and the Strasbourg and Luxembourg jurisprudence on Hungary and Poland, it argues that the constitutional mechanisms that have proved most durable are those that operate through time limits and legislative renewal rather than through judicial review alone, and that the courts' most important contribution has been not to second-guess the existence of an emergency but to insist that the ordinary law continues to apply to everything the emergency does not require.

Keywords: emergency powers; executive aggrandizement; democratic backsliding; states of emergency; judicial review; separation of powers; constitutional design

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INTRODUCTION

Carl Schmitt's observation that the sovereign is he who decides on the exception was intended as a description, but it has served ever since as a warning.² A constitution that permits its own suspension has placed a weapon within reach of anyone who can plausibly claim that the state is in danger, and the history of the twentieth century is in large part the history of that weapon's use. The Weimar Constitution's Article 48 was invoked more than 250 times before it was used to dismantle the Republic. The Indian Constitution's emergency provisions were used in 1975 to imprison the opposition and suspend the courts. The Turkish state of emergency declared after the coup attempt of 2016 lasted two years and was used to dismiss more than 150,000 public servants.

Yet the alternative, a constitution that makes no provision for emergency, is not obviously better. A state that cannot act quickly when attacked will act unconstitutionally, and a constitution that is ignored in a crisis may not be obeyed afterwards. The question for constitutional design is therefore not whether to permit emergency powers but how to confine them, and the question for courts is what role they can usefully play when the executive claims that the ordinary rules no longer apply. This article approaches both questions through the case law, and it does so comparatively, because the failures and successes of emergency constitutionalism are more visible across systems than within any one of them.

THE DECLARED EMERGENCY

A. India, 1975: The Failure of the Courts

The Indian Emergency of 1975 to 1977 remains the paradigm of a constitutional emergency used for unconstitutional ends. Following the Allahabad High Court's judgment setting aside the Prime Minister's election, the President proclaimed an emergency on the ground of internal disturbance, the enforcement of fundamental rights including Article 21 was suspended under Article 359, and tens of thousands of opposition politicians, journalists, and activists were detained without trial under the Maintenance of Internal Security Act. Nine High Courts held that detainees could nonetheless seek habeas corpus on the ground that their detention was not in accordance with the statute. The Supreme Court reversed them in *ADM Jabalpur v. Shivkant*

² Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 5 (George Schwab trans., Univ. of Chi. Press 2005) (1922).

Shukla, holding by a majority of four to one that no person had any locus to move a court for habeas corpus during the emergency, whatever the ground of detention.³ Khanna, J., in dissent, wrote that the Constitution did not create the right to life and liberty but merely recognised it, and that its suspension could not authorise the state to take life or liberty without lawful authority.⁴ The dissent cost him the Chief Justiceship. It was vindicated by the Forty-fourth Amendment, which provided that Articles 20 and 21 could not be suspended even in an emergency and replaced "internal disturbance" with "armed rebellion" as a ground for proclamation,⁵ and it was formally adopted by the Supreme Court in *Puttaswamy*, which declared *ADM Jabalpur* to have been wrongly decided.⁶

The lesson of *ADM Jabalpur* is not simply that the Court failed. It is that the Court failed in the one function it could realistically have performed. The judges could not have prevented the proclamation of the emergency, nor was it their role to assess whether the internal disturbance was real. What they could have done, and what the High Courts had done, was to insist that even a suspended right left the ordinary law of detention in place, so that a person held without statutory authority could still be released. That distinction, between reviewing the existence of an emergency and reviewing the legality of what is done under it, is the central distinction of this field.

Pakistan offers the extreme case of judicial capitulation. The Supreme Court validated the abrogation of the Constitution in 1958 in *Dosso* on the basis of Kelsen's theory that a successful revolution creates its own legality,⁷ validated General Zia's coup in 1977 in *Nusrat Bhutto* on the doctrine of state necessity,⁸ and validated General Musharraf's in 2000 in *Zafar Ali Shah*, going so far as to authorise him to amend the Constitution.⁹ Only in 2009, after the lawyers' movement had restored the deposed Chief Justice, did the Court hold that the 2007 emergency and the judges' oath under it were unconstitutional, and it did so in a judgment that expressly disowned the doctrine of necessity.¹⁰ The Pakistani sequence demonstrates that a court which validates the exception has no principled ground on which to refuse the next one.

³ *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

⁴ *Id.* ¶¶ 530–36 (Khanna, J., dissenting).

⁵ India Const. arts. 352(1), 359(1), as amended by Constitution (Forty-fourth Amendment) Act, 1978.

⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶¶ 119–21 (Chandrachud, J.).

⁷ *State v. Dosso*, PLD 1958 SC 533 (Pak.).

⁸ *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657 (Pak.).

⁹ *Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869 (Pak.).

¹⁰ *Sindh High Court Bar Ass'n v. Federation of Pakistan*, PLD 2009 SC 879 (Pak.).

B. The United States: From *Korematsu* to *Boumediene*

The American cases exhibit the same distinction. *Korematsu v. United States* upheld the exclusion of Japanese-Americans from the West Coast on the basis of military judgment that the Court declined to examine.¹¹ Jackson, J., in dissent, warned that a judicial decision validating a military order on the ground of emergency "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."¹² The Court did not formally repudiate *Korematsu* until 2018, when it did so in a decision that upheld a different exercise of executive power on the ground that it was facially neutral.¹³

The better model is *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Court held that President Truman's seizure of the steel mills during the Korean War was unlawful because Congress had considered and rejected such a power.¹⁴ Jackson, J.'s concurrence, with its three categories of presidential action, at the height of authority when Congress has authorised it, in a zone of twilight when Congress is silent, and at its lowest ebb when Congress has forbidden it, has become the framework through which every subsequent claim of emergency power has been analysed.¹⁵ Its importance lies in the insistence that the emergency does not displace the legislature; it merely raises the question of what the legislature has permitted.

The post-2001 detention cases applied the framework. In *Hamdi v. Rumsfeld*, a plurality held that Congress had authorised the detention of enemy combatants but that a citizen so detained was entitled to notice of the factual basis for his classification and a fair opportunity to rebut it before a neutral decision-maker; O'Connor, J., wrote that "a state of war is not a blank check for the President."¹⁶ In *Hamdan v. Rumsfeld*, the Court held that the military commissions established by executive order violated the Uniform Code of Military Justice and the Geneva Conventions.¹⁷ In *Boumediene v. Bush*, it held that detainees at Guantánamo Bay had a constitutional right to habeas corpus and that the statutory substitute Congress had enacted was inadequate.¹⁸ The trilogy did not question the existence of the conflict or the executive's authority to conduct it. What it did was to hold the line at the point *ADM Jabalpur* had

¹¹ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹² *Id.* at 246 (Jackson, J., dissenting).

¹³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

¹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁵ *Id.* at 635–38 (Jackson, J., concurring).

¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

¹⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁸ *Boumediene v. Bush*, 553 U.S. 723, 771, 792 (2008).

abandoned: whatever the emergency, a person detained by the state is entitled to have a court examine whether the detention is lawful.

C. The United Kingdom: *Belmarsh*

The House of Lords' decision in *A v. Secretary of State for the Home Department* is the clearest common-law statement of the division of labour between courts and the political branches in an emergency.¹⁹ The Anti-terrorism, Crime and Security Act 2001 permitted the indefinite detention without trial of foreign nationals suspected of terrorism who could not be deported, and the government had derogated from Article 5 of the Convention on the ground of a public emergency threatening the life of the nation. By eight to one, the Lords held that the government's assessment that such an emergency existed was entitled to great deference and would not be disturbed, but that the measures taken in response were disproportionate and discriminatory, because they applied only to foreign nationals when the threat from British citizens was of the same character.²⁰ Lord Hoffmann went further and denied that there was an emergency threatening the life of the nation at all, observing that "the real threat to the life of the nation ... comes not from terrorism but from laws such as these."²¹ The majority's approach is the more sustainable. It accepts that the existence of an emergency is primarily a political judgment, and it reserves the court's scrutiny for the question of whether the specific measure is necessary and non-discriminatory. The European Court of Human Rights endorsed that approach when the case reached Strasbourg.²²

THE PERMANENT EMERGENCY

A. Hungary

The declared emergency is dangerous because it is visible. The permanent emergency is more dangerous because it is not. Hungary's Fundamental Law of 2011, adopted by a governing party with a two-thirds majority, contains an elaborate scheme of special legal orders, and the government has been operating under one or another of them almost continuously since 2015, first on the ground of mass migration, then the COVID-19 pandemic, and since 2022 the war

¹⁹ *A v. Sec'y of State for the Home Dep't* [2004] UKHL 56, [2005] 2 AC 68.

²⁰ *Id.* ¶¶ 29, 43–44 (Lord Bingham).

²¹ *Id.* ¶ 97 (Lord Hoffmann).

²² *A v. United Kingdom*, App. No. 3455/05, ¶¶ 173–90 (Eur. Ct. H.R. Feb. 19, 2009) (Grand Chamber).

in Ukraine.²³ The Authorization Act of March 2020 permitted the government to rule by decree without time limit and suspended by-elections, and although it was formally repealed three months later, the government simultaneously enacted a "transitional" law that preserved much of the decree power.²⁴ The Constitutional Court, whose composition had been changed by the same majority that adopted the Fundamental Law, has not obstructed any of this. The Court of Justice of the European Union has found Hungary in breach of Union law on numerous specific matters, including the treatment of asylum seekers and the forced retirement of judges,²⁵ but it has no jurisdiction to review the emergency framework itself, and the Article 7 procedure under the Treaty on European Union, which could in theory suspend Hungary's voting rights, has been stalled for years by the requirement of unanimity among the other member states.

B. Turkey

Turkey's post-coup emergency of 2016 to 2018 was declared under Article 120 of the Constitution and notified as a derogation under Article 15 of the Convention. The government issued 32 emergency decrees dismissing public servants, closing media outlets, and dissolving associations, and the Constitutional Court held that it lacked jurisdiction to review decrees issued under the emergency.²⁶ The European Court of Human Rights, in cases arising from the detention of judges and journalists, held that Article 15 did not permit measures that went beyond what the exigencies of the situation strictly required, and found violations of Article 5 in the detention of a Constitutional Court judge without reasonable suspicion.²⁷ The Strasbourg decisions established a principle of some importance: derogation is not a blanket that covers everything done while it is in force but a measure-by-measure justification that must be shown for each interference. The principle is sound. Its practical effect in Turkey has been slight, because the emergency decrees were converted into ordinary legislation before the emergency ended, so that the powers survived their formal expiry.

²³ Magyarország Alaptörvénye [Fundamental Law of Hungary] arts. 48–54 (as amended).

²⁴ 2020. évi XII. törvény a koronavírus elleni védekezésről [Act XII of 2020 on Protecting Against the Coronavirus] (Hung.).

²⁵ Case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687; Case C-808/18, *Commission v. Hungary*, ECLI:EU:C:2020:1029.

²⁶ *Anayasa Mahkemesi* [Constitutional Court], E. 2016/166, K. 2016/159 (Oct. 12, 2016) (Turk.).

²⁷ *Alparslan Altan v. Turkey*, App. No. 12778/17, ¶¶ 110–20, 146–47 (Eur. Ct. H.R. Apr. 16, 2019); *Baş v. Turkey*, App. No. 66448/17 (Eur. Ct. H.R. Mar. 3, 2020).

C. The Pandemic as a Test Case

The COVID-19 pandemic subjected every constitutional system to the same shock at the same time, and the responses form a natural experiment. Many states, including India, South Africa, and the United Kingdom, did not declare a constitutional emergency at all but governed through disaster management or public health statutes that conferred broad delegated powers on the executive.²⁸ The result was that the formal safeguards attached to emergency provisions, including legislative approval and time limits, were bypassed, and the constraints that operated were those of ordinary administrative law. The Israeli Supreme Court's decision in *Ben Meir v. Prime Minister* illustrates the courts' response at its best. The government had authorised the security service to track the mobile phones of citizens for contact tracing under emergency regulations. The Court held that a measure of such intrusiveness could not rest on emergency regulations indefinitely and that primary legislation was required, giving the Knesset a short period to enact it.²⁹ The German Federal Constitutional Court likewise upheld the federal "emergency brake" legislation on the merits but only after a detailed proportionality analysis of each measure, including curfews and school closures, against the state of scientific knowledge at the time.³⁰ In each case the court accepted the existence of the crisis and reserved its scrutiny for the measure, which is the pattern that the declared-emergency cases had already established.

D. Design Lessons

What Hungary and Turkey share is not that their constitutions lacked emergency safeguards but that the safeguards were procedural and the procedure was controlled by the same majority that declared the emergency. Bruce Ackerman's proposal of a "supermajoritarian escalator," under which each renewal of an emergency would require a larger legislative majority than the last, addresses exactly this weakness.³¹ So does the South African model, in which a state of emergency may be declared only by Act of Parliament, may last only twenty-one days unless extended by resolution, may be extended by more than three months only with a sixty per cent majority, and remains subject to review by any competent court.³² The South African provision

²⁸ Disaster Management Act, No. 53 of 2005, §§ 6, 10 (India); Disaster Management Act 57 of 2002 § 27 (S. Afr.); Coronavirus Act 2020, c. 7 (UK).

²⁹ HCJ 2109/20 *Ben Meir v. Prime Minister* (Apr. 26, 2020) (Isr.).

³⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 19, 2021, 1 BvR 781/21 (Bundesnotbremse I) (Ger.).

³¹ Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029, 1047–49 (2004).

³² S. Afr. Const., 1996, § 37(1)–(3).

also lists the rights that may not be derogated from at all, and specifies that any derogation must be strictly required by the emergency.³³ These are textual constraints, and they operate through time and through the legislature rather than through judicial review. The Indian Forty-fourth Amendment, which requires a proclamation to be approved by both Houses within a month by a two-thirds majority and to be renewed every six months, is a version of the same idea.³⁴ The comparative evidence suggests that these time-bound legislative mechanisms have been more effective than judicial review in preventing the conversion of a temporary emergency into a permanent one, for the simple reason that a court can only act on a case that is brought, whereas a sunset clause acts of its own accord.

AGGRANDIZEMENT WITHOUT EMERGENCY

A. Prorogation and the Bypassing of Parliament

Executive aggrandizement does not require a state of emergency. It requires only the discovery that an ordinary power can be used to disable a check. The United Kingdom's prorogation crisis of 2019 is the clearest example. The Prime Minister advised the Queen to prorogue Parliament for five weeks at the moment when the Brexit deadline was approaching and Parliament was seeking to constrain the executive's negotiating position. The Supreme Court held unanimously that the advice was unlawful, because the prerogative power of prorogation was limited by the constitutional principles of parliamentary sovereignty and accountability, and a prorogation that had the effect of frustrating Parliament's ability to perform its functions without reasonable justification exceeded that limit.³⁵ The Court did not ask whether the Prime Minister's motive was improper; it asked only what the effect of the prorogation was and whether any justification had been offered. None had. The decision is significant for its method. The Court identified the constitutional function that the exercise of power would disable and required the executive to justify the disabling. That method is transferable to any system in which an executive uses a formally lawful power to prevent a legislature from sitting, a court from hearing, or an election from occurring.

³³ *Id.* § 37(5).

³⁴ India Const. art. 352(4)–(6).

³⁵ *R (Miller) v. Prime Minister* [2019] UKSC 41, [2020] AC 373, ¶¶ 41–51.

B. Executive Orders and Presidential Immunity

The United States presents the problem in a different form. The President's use of executive orders and emergency declarations under statutes such as the National Emergencies Act and the International Emergency Economic Powers Act has expanded steadily, and the number of national emergencies in force at any time now exceeds forty. In *Trump v. Hawaii* the Court upheld a proclamation restricting entry on national security grounds, applying deferential review.³⁶ In *Biden v. Nebraska* it struck down a student-loan forgiveness programme adopted under emergency statutory authority, holding that the statute did not clearly authorise a measure of such economic and political significance.³⁷ The "major questions" doctrine applied in the latter case is, in effect, a *Youngstown* principle for the administrative state: the more consequential the executive's claimed power, the clearer the legislative authorisation must be.

The most consequential recent decision is *Trump v. United States*, in which the Court held that a former President enjoys absolute immunity from criminal prosecution for acts within his core constitutional powers and presumptive immunity for other official acts.³⁸ The majority reasoned that the threat of prosecution would chill the vigorous exercise of executive power. Sotomayor, J., in dissent, wrote that the decision made the President "a king above the law" and that the majority had invented an immunity with no basis in the constitutional text.³⁹ Whatever view one takes of the merits, the decision removes one of the checks on which the constitutional design had implicitly relied: the assumption that a President who broke the criminal law in office would eventually answer for it. Its effect on the incentives of future presidents is the subject of an experiment now under way.

C. Elections and the Courts

Democratic backsliding is completed when the mechanism of removal is disabled. Courts have been most effective at resisting this when the attack is on the electoral process itself. The Kenyan Supreme Court's annulment of the 2017 presidential election for irregularities in the transmission of results was the first such annulment in Africa and was followed by a re-run.⁴⁰ The Malawian Constitutional Court's annulment of the 2019 election, affirmed by the Supreme

³⁶ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

³⁷ *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–75 (2023).

³⁸ *Trump v. United States*, 603 U.S. 593, 606–15 (2024).

³⁹ *Id.* at 685 (Sotomayor, J., dissenting).

⁴⁰ *Odinga v. Independent Electoral & Boundaries Comm'n* [2017] eKLR, Presidential Petition No. 1 of 2017 (Kenya).

Court of Appeal, led to a re-run that the incumbent lost.⁴¹ The Brazilian Superior Electoral Court's disqualification of former President Bolsonaro from office for eight years, for abuse of political power in disseminating unfounded claims about the electoral system, is a further instance.⁴² In each case the court was defending the process by which the executive could be removed, which is the one function that no other institution can perform once the executive controls the rest.

CONCLUSION

The comparative record supports three conclusions. First, courts are ill-suited to deciding whether an emergency exists, and the cases in which they have attempted it, or in which they have deferred completely, have been the least successful. *ADM Jabalpur* and *Korematsu* deferred completely; Lord Hoffmann in *Belmarsh* attempted the opposite; neither approach has been followed. The approach that has endured is the one taken by the *Belmarsh* majority and the *Hamdi* plurality: accept the political judgment that an emergency exists, and scrutinise with full rigour whether each measure taken is necessary, proportionate, and non-discriminatory.

Second, the greatest threat is duration, and the most effective safeguard against duration is not judicial but structural. Sunset clauses, supermajority requirements for renewal, and non-derogable rights specified in the text have prevented the normalisation of emergency powers where they exist and have been absent where normalisation has occurred. Hungary's difficulty is not that its Constitutional Court is weak; it is that nothing in the Fundamental Law forces the emergency to end.

Third, aggrandizement without emergency is now the more common route to backsliding, and it is best resisted by the method of *Miller (No 2)*: identify the constitutional function that the exercise of power would disable, and require justification. The method does not require a court to assess motive or to police policy. It requires only that the executive explain why the legislature must not sit, the court must not hear, or the election must not be held. An executive that cannot answer that question has revealed its purpose, and a court that asks it has done the most that a court can do.

⁴¹ *Chilima v. Mutharika*, Constitutional Reference No. 1 of 2019 (Malawi High Ct. Feb. 3, 2020), *aff'd*, MSCA Constitutional Appeal No. 1 of 2020 (May 8, 2020).

⁴² Tribunal Superior Eleitoral [T.S.E.], AIJE 0600814-85.2022.6.00.0000, Relator: Min. Benedito Gonçalves, 30.06.2023 (Braz.).