

# Comparative Analysis Between the Emergency Provisions of India, USA and UK

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## ABSTRACT

In the intricate tapestry of governance, the fabric of democracy is woven with threads of stability and peace, crucial for the seamless implementation of laws. Yet, the warp and weft of societal dynamics occasionally unravel into precarious situations, compelling the state to navigate through legal complexities to safeguard the greater good. In such moments of peril, emergency provisions emerge as a critical tool, offering a temporary departure from the normative legal framework to address imminent threats and ensure the welfare of the populace. These emergency measures, tailored to the unique contours of each state, encompass a spectrum of factors including the triggers prompting their invocation, the authority vested with the power of declaration, and the extent of rights and liberties that may be suspended in their wake. From natural disasters to political unrest, the reasons behind the proclamation of an emergency are manifold, each demanding a nuanced response calibrated to the specific context. This paper undertakes a comprehensive examination, delving into the emergency provisions entrenched within the legal architectures of India, the United States, and the United Kingdom. By juxtaposing and scrutinizing these frameworks, the aim is to illuminate the divergent pathways taken by democracies in times of crisis, shedding light on the intricate interplay between liberty, security, and governance.

**Keywords:** Emergency Provisions, Constitution, Government, Fundamental Rights.

## I. INTRODUCTION

The declaration of a state of emergency within a country is a significant event, but one that occurs infrequently and only in extraordinary circumstances. An emergency, as defined, entails a scenario where the government of a nation either suspends or modifies the standard functioning of the country, effectively placing certain provisions of the constitution and other governmental organs in a state of dormancy. Across the globe, many democratic constitutions incorporate provisions regarding emergencies, granting the executive branch extensive powers to act decisively in times of pressing urgency. These provisions are designed to empower the executive to take measures necessary for safeguarding national security, maintaining law and order, protecting the lives and property of citizens, ensuring the continuity of vital public services, and restoring stability within the nation. The scope of these emergency powers is broad, allowing the executive to curtail or suspend certain constitutional rights, centralize decision-making authority, and, in some cases, even postpone scheduled elections. However, the exercise of such powers is typically subject to strict scrutiny and oversight to prevent abuse and ensure that democratic principles are upheld even in times of crisis. Thus, while emergencies may necessitate extraordinary measures, they also underscore the resilience and adaptability of democratic governance in the face of adversity.

## II. NEED FOR PROVISIONS RELATING TO EMERGENCY

“A persuasive justification for the utilization of emergency power by a modern constitutional democracy can be found in the notion that such a state's political system is designed with an intricacy predicated on the calm waters of a normal environment, and that the likelihood of successfully maintaining a government of such intricacy during the turbulence of a genuine crisis is low.”<sup>1</sup>

The concept of emergency provisions emerges from the necessity, as encapsulated by the maxim “necessitas legem non habet”, which means, “necessity knows no law” that implies - “A person may legitimately transgress against a rule of the legal system during circumstances in which acceding to the letter of law would violate the law’s ultimate purpose of furthering the common well-being of men”<sup>2</sup> This rationale rooted in necessity acknowledges the imperative of ensuring fair enforcement of the law, even if it requires prioritizing higher values over lesser ones. It also acknowledges the possibility of technical breaches of legal mandates in pursuit of outcomes that are more desirable than strict adherence to the letter of the law.

Emergency provisions play a crucial role in enabling the state to effectively address crises while ensuring that the exercise of emergency powers remains within the confines of legal norms. They serve as a defensive mechanism for democracy, provided they are applied judiciously and not arbitrarily, serving as a means to bolster democratic resilience by providing the necessary authority to address serious challenges within the framework of a constitution. The absence of such emergency provisions in a state's constitution or special statutes would leave the state with two unfavorable options:

1. Either it would be rendered powerless, unable to take essential actions needed to address hazardous situations, OR
2. It would resort to exercising powers beyond the limits of the law.

Both outcomes would have detrimental consequences for society at large.

It is undeniable that governments have, in the past, utilized emergency powers to suppress peaceful dissent, manipulate elections, delay the formation of new governments, or even restrict press freedom. Hence, it is imperative that careful consideration be given to the formulation of a nation's emergency provisions. Moreover, the greater challenge lies in finding a balance that allows the government to use emergency provisions constructively while preventing their misuse or abuse in authoritarian ways.

## III. THE HISTORICAL BACKGROUND AND ITS ROLE IN SHAPING PRESENT DAY PROVISIONS

### 1. India

In India, the historical context surrounding the framing of the constitution significantly influenced the incorporation of emergency provisions. The tumultuous period leading up to and following independence compelled the framers to contemplate mechanisms for managing future crises. Communal tensions, particularly between Hindus and Muslims, posed a significant threat to the nascent Indian democracy. Additionally, the prevalence of communal disharmony, regionalism, and casteism heightened the urgency for constitutional safeguards. The reluctance of certain princely states, notably Hyderabad, Junagarh, and Kashmir, to join India further underscored the need for such provisions, leading to the inclusion of Article 352 (National Emergency) in the Indian Constitution.

<sup>1</sup> MICHAEL FREEMAN, FREEDOM OR SECURITY 6 (2003)

<sup>2</sup> GIORGIO AGAMBEN, STATE OF EXCEPTION 24-25 (2005)

Another driving factor behind the introduction of emergency provisions was the presence of Communist activities during that era. The precarious financial situation arising from partition and a decline in foreign exchange reserves necessitated the insertion of Financial Emergency under Article 360.

The most infamous instance of invoking emergency provisions occurred during the period of 1975-77. This period, marked by the declaration of a state of emergency under Article 352 by then Prime Minister Indira Gandhi, witnessed widespread violations of fundamental and human rights, suspension of elections, and erosion of democratic values. The pretext for declaring this emergency was cited as “internal disturbance”, granting extensive discretionary powers to the government. However, this move faced severe criticism from the public, leading to significant political repercussions. The subsequent victory of the Janata Party in the Lok Sabha elections and the enactment of the 44th Amendment Act in 1978, aimed at curbing governmental abuse of power and safeguarding citizens' rights, were direct consequences of the 1975 emergency.

In addition to the 1975-77 emergency, Article 352 has been invoked on two other occasions. Firstly, in 1962 during the Indo-China War and subsequently extended during the conflict between India and Pakistan in 1965, which was ultimately lifted in 1968.<sup>3</sup> Secondly, in 1971, during India's hostilities with Pakistan, another emergency was declared citing "external aggression." It's noteworthy that while the emergency declared in 1971 was already in effect, the emergency of 1975 was declared subsequently.

## 2. USA

To enable the U.S President to address any upheaval or exigency in the country, federal laws have endowed him with extensive powers related to emergencies. It's notable that these powers extend beyond military or wartime scenarios. Certain powers, both constitutional and statutory, are always available to the President, while others are “statutory delegations” that remain inactive until the President declares a national emergency. These powers include control over production, deployment of military forces abroad, seizure of properties and commodities, imposition of martial law, regulation of travel, communication, and transportation, among others. Before World War I, Presidents exercised these powers at their discretion. After World War I, Presidents had numerous emergency powers ready, activated by the declaration of a national emergency, sometimes with unrestricted proclamations and other times limited to specific policy areas.

Regarding emergency provisions, there were limited constraints on the President's discretionary powers. In “**Youngstown Sheet & Tube Co. v. Sawyer**”, the Supreme Court restricted what a President could do in emergencies but affirmed the President's authority to declare emergencies at his discretion.<sup>4</sup> Thus, in 1976, the National Emergencies Act was passed to establish a system of checks and balances on the President's powers. The 9/11 terrorist attacks and their aftermath significantly influenced the development of emergency provisions in the USA. President George W. Bush declared an emergency, and Congress issued a joint resolution authorizing the President to use necessary and appropriate force against those responsible for the attacks. This led to enactments like the Patriot Act, which expanded surveillance powers and allowed wiretapping, acquisition of business and bank records, and details of suspects with court permission. While this Act bolstered border security and thwarted many terrorist attempts, it also faced criticism for privacy violations and harassment of innocent immigrants.

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<sup>3</sup> Shylashri Shankar, The State of Emergency in India: Bockenforde's Model in a Sub-National Context, 19 GERMAN L.J. 197 (2018)

<sup>4</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

To limit the powers of the U.S. President when declaring an emergency, the National Emergencies Act was passed. In 1973, a Special Committee was established to examine national emergency matters. During its investigation, it identified four existing national emergencies: the banking crisis of 1933, the Korean War in 1950, the postal workers' strike in 1970, and the inflation emergency in 1971. It was noted that declaring one emergency activated all related statutory provisions, resulting in the nation being under a state of emergency for forty-one years.<sup>5</sup> Consequently, the National Emergencies Act of 1976 was enacted to prevent all emergency-related executive powers from automatically being triggered by a single declaration. Section 201 of this Act grants the President authority to declare a national emergency, with the requirement that Congress be notified of such proclamation and that it be published in the Federal Register.<sup>6</sup>

It's worth noting that the term 'emergency' doesn't appear in any articles of the US Constitution. However, certain provisions are included in the Constitution to address exigencies or emergencies. For instance, Section 8 of Article I grants Congress the authority to address war and military-related matters, including the power to declare war, maintain the navy and army, regulate military forces, and call forth the militia to repel invasions or suppress insurrections. Article II, Section 2 designates the President as Commander in Chief of the armed forces, including the militia when in federal service.<sup>7</sup> Additionally, Article III, Section 3<sup>8</sup> mandates the President to ensure the faithful execution of laws, while Article IV, Section 4 imposes on the federal government the duty to protect states from invasion or domestic violence.<sup>9</sup> Although these provisions don't explicitly mention emergencies, they imply recognition of emergency laws. They aim to safeguard states from various threats such as war, invasion, domestic violence, and insurrection, which typically prompt the declaration of a state of emergency. Despite the absence of explicit emergency provisions, citizens are afforded specific safeguards, such as the non-suspension of the writ of Habeas Corpus unless public safety necessitates it during cases of rebellion or invasion.<sup>10</sup>

Another safeguard granted to citizens is that an individual cannot face charges for a capital crime until a grand jury has indicted them, "except in cases arising within the land or naval forces, or in the Militia, when in actual service during wartime or public danger."<sup>11</sup> Additionally, states are prohibited from engaging in war "unless invaded, or faced with imminent danger that cannot be delayed."<sup>12</sup>

The Tory Government, within just three years of taking office, declared a fifth emergency, which heightened public awareness regarding Britain's emergency powers. At the outset of World War I, a "state of national emergency" was declared, marking the first such declaration since the Napoleonic wars a century earlier. The enactment of the Defence of the Realm Act (commonly known as DORA) swiftly followed in 1914. This Act contained a significant clause granting the government authority to establish rules for "securing the public safety and the defence of the realm." Consequently, the government promptly issued a series of Regulations under DORA. Although these Regulations were initially set to expire upon

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<sup>5</sup> Patrick A. Thronson, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 MICHIGAN L.J. 737 (2013).

<sup>6</sup> Adv Abdul Jashid, *A Comparative Analysis of Emergency Provisions in India, United Kingdom, United States of America, and France*, 9 International Journal of All Research Education and Scientific Methods (2021), [https://www.ijaresm.com/uploaded\\_files/document\\_file/Adv.\\_Abdul\\_Jashid\\_VTYT.pdf](https://www.ijaresm.com/uploaded_files/document_file/Adv._Abdul_Jashid_VTYT.pdf) (Last Visited May 5, 2024)

<sup>7</sup> US Constitution, Art. 2 § 2

<sup>8</sup> U.S. Constitution

<sup>9</sup> William B. Fisch, *Emergency In The Constitutional Law Of United States*, 38 AM. J. COMP. L. SUPP. 389(1990).

<sup>10</sup> U.S. Constitution, Art. I § 9, cl. 2

<sup>11</sup> U.S. Constitution Amendment V

<sup>12</sup> U.S. Constitution Art. I § 10, para. 3

an official declaration of the end of hostilities, the government and various state agencies expressed a desire to permanently retain the essential powers provided by DORA.

Within six years of the Defence of the Realm Act (DORA), a new legislation emerged: The Emergency Powers Act of 1920. This Act aimed “to make exceptional provisions for the protection of the community in case of emergency.” It sought to equip the government with specific measures to address situations arising from major strikes, civil disorders, and pre-revolutionary conditions. Under this Act, an emergency could be declared by the government if it deemed that the essential services of the country were under threat. Consequently, the Cabinet was empowered to devise regulations and possess necessary powers, as deemed fit by His Majesty, to restore order or address any other purpose. These regulations were subject to approval by Parliament and required renewal every month. Notably, the authoritative nature of this enactment is evident in its provision granting Parliament the power to amend or suspend all laws. However, the 1920 Act imposed certain limitations: “1) Regulations could not introduce compulsory military service or industrial conscription without a declaration of a state of war; 2) Participation in peaceful strikes was not considered an offense; and 3) Existing procedures in criminal cases could not be altered.”<sup>13</sup>

The first instance of an emergency proclamation under the 1920 Act occurred in 1921 when the Triple Alliances, composed of transport workers, railwaymen, and miners, initiated a strike to protest significant wage cuts and lock-out notices issued by mine owners. In response, the Lloyd George government declared an emergency and dispatched troops to working-class areas. This emergency lasted for only three days. The General Strike of 1926, which endured for eight months, represented the longest continuous use of the 1920 Act. Over the subsequent 40 years, there were only four other emergency proclamations: in 1948, 1949, 1955, and 1966. The Emergency Powers Act of 1920 underwent amendments through the Emergency Powers Act of 1964. These amendments broadened the scope of justifiable reasons for declaring an emergency, stating that an emergency could arise from events likely to disrupt the life of the community. Additionally, provisions from the Defence (Armed Forces) Regulations of 1939 were made permanent, allowing for the direct employment of the armed forces in urgent work of national importance, including agricultural tasks.

Finally, the Emergency Powers (Defence) Act of 1939 was enacted to address the declaration of a "state of war," whether internal or external. This Act introduced regulations known as Defence Regulations, which automatically came into effect without requiring pre or post approval from Parliament. Additionally, the Act authorized the amendment, suspension, or application of any Act of Parliament with or without modification. Despite its repeal in 1959, this Act can still serve as a framework for subsequent legislation in the event of imminent danger of internal or external war. As a result, the Emergency Powers Act of 1920 can be seen as a response to a period of significant uncertainty within the ruling class. This Act has historically served as a powerful tool, particularly in the face of widespread opposition, and continues to exert influence in contemporary contexts.<sup>14</sup>

#### IV. COMPARATIVE ANALYSIS

The historical background of emergency provisions in India, the USA, and the UK reveals distinct reasons

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<sup>13</sup> The Emergency Powers Act, Sec. 2 cl. 1

<sup>14</sup> Adv Adhar Langade, Comparative Analysis of Emergency Provisions in India, UK and USA, 5 International Journal of Research Publication and Reviews 4559 (2024), <https://ijrpr.com/uploads/V5ISSUE4/IJRPR25263.pdf>, (Last Visited May 6, 2024)



for their origins. In the USA and UK, emergency laws evolved in response to years of abuse and misuse of older laws, prompting the formulation of contemporary laws to address shortcomings. Conversely, in India, the framers of the Constitution incorporated emergency provisions during its drafting, with clear rules regarding declaration and continuation. Unlike the Constitutions of the USA or UK, which do not explicitly mention the term 'Emergency,' the Indian Constitution contains detailed provisions on emergency, eliminating the need for a separate statute in India to deal with emergencies.

This leads us to the second aspect of comparing emergency provisions in India, the USA, and the UK. In India, the authority to declare an emergency rests with Parliament and is enshrined in the Constitution. Conversely, in the USA, the President holds the power to declare an emergency, as outlined in the National Emergencies Act of 1976 and the Patriot Act of 2001. In the UK, following the 1964 amendment to the Emergency Powers Act of 1920, the Monarch possesses the authority to proclaim an emergency in the event of a perceived threat to vital services in the country. Thus, it is evident that while Parliament holds the authority to declare a state of emergency in India, it rests with the President in the USA and with the Monarch in the UK.

Even during wartime, the courts in the USA possess jurisdiction to assess the justification of laws related to emergencies. For instance, in the case of **Hirabayashi v. United States**<sup>15</sup>, “certain regulations imposing restrictions on individuals of Japanese origin were upheld by the court, requiring them to remain in their residences during specific hours to prevent espionage or sabotage activities.”<sup>16</sup> This unpredictability in court decisions has led to an indeterminate process. Moreover, the courts have the authority to delineate the functional scope of the government during emergencies. It's worth noting that during both World Wars, the terms “war” and “defense” were broadly interpreted, granting the government wider latitude to act in defense of the nation. However, such court oversight over emergency laws is absent in India and the UK. Under the UK legal system, no court or body possesses the constitutional right to challenge an act of parliament.<sup>17</sup>

The authority of the Court is limited to interpreting the Parliament's intentions when evaluating any parliamentary act. Similarly, within the Indian legal system, the power to declare an emergency rests with the President upon the recommendation of Parliament. The Indian Constitution comprehensively addresses emergency provisions, minimizing the need for judicial interpretation. Consequently, the judiciary lacks jurisdiction over emergency regulations unless they contravene Article 20 (protection against self-incrimination) and Article 21 (protection of life and personal liberty). However, in the **Minerva Mills v. Union of India**<sup>18</sup> case, Justice Bhagwati asserted that the judicial review could encompass whether the President, in declaring the emergency, exercised due diligence and stayed within the bounds of authority.

The USA adheres strictly to a Federal system, while India follows a Quasi Federal System. A significant similarity between the Emergency provisions of India and the USA is that in the event of a proclamation of a national emergency, the central government assumes a major portion of functions and powers. This

<sup>15</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943)

<sup>16</sup> Abhishek Kumar Khaund, National Emergency: A Comparative Analysis of Emergency Laws in India USA and Germany (Feb. 10, 2021), <https://www.aequivic.in/post/aijacla-national-emergency-a-comparative-analysis-of-emergency-laws-in-india-u-s-a-and-germany-1> (Last Visited May 6, 2024)

<sup>17</sup> Brian McGiverin, *In the face of danger: A Comparative Analysis of the use of emergency powers in the United States and the United Kingdom in the 20th CENTURY*, 18:1 IND. INT'L & COMP. L. REV. 260 (2008), <https://mckinneylaw.iu.edu/iiclr/pdf/vol18p233.pdf> (Last Visited May 6, 2024)

<sup>18</sup> *Minerva Mills v. Union of India*, A.I.R 1980 SC 1789; 1981 SCR (1) 206; 2 SCC 591.

is because the central government is typically responsible and obligated to safeguard the nation. Thus, both India and the USA undergo an immediate transition from their federal nature to a unitary one during a national emergency.

## V. CONCLUSION

From the aforementioned aspects, it can be inferred that the emergency provisions in India, the USA, and the UK share some similarities while differing in other respects. Firstly, in the USA, the courts play a significant role in determining the justiciability of emergency provisions, which is not the case in India and the UK. Additionally, the Indian Constitution contains detailed provisions regarding emergencies, whereas the Constitutions of the USA and the UK do not explicitly mention the term 'Emergency'. Despite these differences, all three nations have implemented safeguards to prevent the abuse of emergency powers by authorities.

Each of the three countries has learned from past mistakes and subsequently implemented specific amendments to prevent the abuse of powers. However, despite improvements in current laws, there still exists the potential for arbitrary and unauthorized use of emergency provisions. Therefore, India, the USA, and the UK have opportunities to learn from each other, particularly in the case of national emergencies, to enhance their emergency laws. India and the UK can learn from the USA the importance of strengthening their judiciary in matters related to emergencies, granting the judiciary the authority to assess the fairness of emergency laws. Similarly, the USA can consider incorporating more detailed and comprehensive emergency provisions into its legal framework. During emergencies, basic human rights have often been violated, highlighting the need for all three countries to adhere to international standards and norms to prevent the infringement of these rights. By doing so, they can fulfill their international obligations and uphold the fundamental rights of citizens, even during times of emergency.