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The Role of the Judiciary in Protecting Civil Liberties During States of Emergency: Case Law Analysis

Vertul Bansia
Research Scholar, Faculty of Law, Tantia University, Sriganganagar
Dr. Saurabh Garg
Research Supervisor, Faculty of Law, Tantia University, Sriganganagar

Abstract

States of emergency are such instances of extraordinary crisis where the government tends to increase its authorities to ensure national security, internal peace or the sovereignty. However, expansions such as those are virtually bound to create tension with the maintenance of civil liberties, the major building blocks of constitutional democracies. The paper explores the role of the judiciary as a constitutional protection in balancing the competing social values of freedom and safety when it comes time of emergency. It uses the case law approach by examining such landmark rulings as A.K. Gopalan v. State of Madras v ADM Jabalpur. Shivkant Shukla, vs Maneka Gandhi. Union of India, and Canadian comparative jurisprudence in the United States, the United Kingdom, and Germany. The paper indicates the trend in judicial reactions that has swung between the defense and active guard of the individual rights to the determination of the path of constitutionalism and democratic accountability. In this examination, the paper brings out the capacity of the judiciary to take social leadership important not only in the capacity of the watchdog of the important rights, but also of establishing the pattern of ruling for the long-term crisis situations. The results are that vigilant and principled judicial body can only be invaluable in both deterring the loss of civil liberties in the guise of structural empowerments, as well as in safeguarding and ensuring the concern that constitutional commitments stand strong even in times of national weakness.

Keywords

Civil Liberties, Emergency Powers, Judiciary, Constitutional Law, Case Law Analysis, Judicial Activism, Proportionality, Democratic Governance.

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1. Introduction

The corner stone of modern constitutional democracies that ensures the millions of people against arbitrary treatment of the state and also provides an individual the basic freedoms (i.e. the right to life, the right to free speech and the equality before the law). These rights, however, have occurred under the pressure during times of national crisis and during the emergency States employ the right in cases of war between countries or a threat made to sovereignty and integrity, violence against countries or internal unrest. The parties involved in a dilemma between the legal interest of the state to allow national security and the fundamental significance of constitutional guarantees to ensure that the safeguards allow personal liberty is not easy.[1] Since the case of various countries experience is familiar, the emergency is a condition giving preference to the dominance of the executive and places in motion critical concerns regarding the survival of constitutionalism.

Within this environment, the judicial branch of government was an institution with a special responsibility to become a custodian of the Constitution. Administrative acts are point-by-point reviewed and contrasted in governmental courts to assess whether they have constituted the lawful conduct permitted under the constitution, and whether the confines of civil rights have been just and reasonable. The Indian political institutional structure was designed [from the legacy of colonialism and resulting post-independence paranoia] to afford total emergence parameters through Articles 352-360 of the constitution.[2] The provisions have since been subjected to the pressure of primary rights realization. The judicial attitude in 1975-77 examines how revisionary jurisprudence and its problematic judgments created a judicial attitude towards civil liberties produced during a time of crisis. Lastly, the outbreaks in the United States, the United Kingdom and Germany can help highlight how philosophical variations on the

[1] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press, 2003) p. 215.
[2] Madhav Khosla, *The Indian Constitution* (Oxford University Press, 2012) p. 87.

mode of thought concerning the judiciary have been helpful for adapting the extent of emergency powers and the extent of continuity of rights to the respective contexts.

This study is informed by the awareness of the fact that absent vigorous preventive measures of judicial action, an emergency can cripple the very luxuries of democracy that are supposed to be liberalised through the operation of the law of generation.[3] The paper, offering critical structure of judicial reactions in specific jurisdictions, seeks to learn to improve a better aware perception about the balance between freedoms and safety by the courts, making sure that such constitutional democracies are able to serve to protect individual rights even in times when some remarkably unusual things occur.

Research Problem

The paradoxical nature of the dilemma which the present paper attempts to address is the tension between the fact that state power should be enhanced during the state of emergency, and the preservation of civil freedom. Although constitutions have been instrumental in giving a guideline to the power of emergency, these constitutions have either been ambiguous or very lenient to interpretation by the executive based on the emergency test it is. When this happens, it is the judiciary that determines the remaining resort of the constitutional equilibrium. However, judicial responses have ranged from an improper degree of deference to the executive, as it did in ADM Jabalpur v. Shivkant Shukla, in support of liberties, Maneka Gandhi v Union of India. This dissonance prompts the question to what extent the judiciary has carried through its status as a guardian of civil liberties during states of emergency, and what we can learn from case law based on comparative studies.

Objectives of the Study

1. To examine the constitutional basis of civil liberties and emergency powers in India and selected comparative jurisdictions.
2. To analyze the role of the Indian judiciary through landmark case law concerning emergency provisions.
3. To compare Indian judicial responses with those of the United States, United Kingdom, and Germany.
4. To critically evaluate whether judicial decisions have safeguarded or undermined civil liberties during emergencies.
5. To propose insights and recommendations for strengthening judicial approaches in future constitutional crises.

Methodology

This paper uses the doctrinal method of research, with main and secondary sources of laws. Primary sources are accessed as provisions of constitution, statutory framework, leading judicial decisions from India and/or comparative jurisdictions. Secondary sources include scholarly articles and books and commentaries which offer analytical views of civil liberties and emergency powers. A comparative case law study provides the foundation for this study as it enables the paper to follow patterns, deviations, and lessons from various legal systems. The research has a qualitative nature, because it relies on the interpretative analysis of judge's judgments and legal literature rather than the empirical data. The area of study is confined to constitutional

[3] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019) p. 143.

democracies in which judicial traditions are established, namely India, US, UK, and Germany.

2. Civil Liberties and Emergency Powers: A Conceptual Overview

Meaning and Scope of Civil Liberties

Civil liberties are key endowments of constitutional democracies, describing the basic freedoms afforded the citizen by law, which would defend the citizen against empiric actions by the government, and guarantee his dignity as an individual. They include freedom of speech and expression, equality before the law, right to liberty, right to privacy and freedom from unreasonable detention.[4] These freedoms are not merely arrogant postulations but the legally codifiable prerogatives that are embedded in the constitutional laws' text and supported by the judicial approach. In India, for example, civil liberties have a huge framework for basic rights which are enshrined under Part III of the Constitution and comparable to, for example, provisions in the U.S. Bill of Rights or the European Convention on Human Rights. However, the extent of these liberties is a fluid content; through the years the courts have furthered the scope of these liberties; namely, based on Article 21 (right to life) the Indian Supreme Court interpreted this right as encompassing the right to live with dignity, health and livelihood.[5]

Civil liberties are unique in that they are aimed at curtailing the power of the state and at preserving the balance between power and liberty. However, they are not absolute, as all constitutional orders acknowledge that rights may be limited in the interest of public order, morality or national security. However, the principle of proportionality requires such limitations to be narrowly proportional and subject to judicial review.[6] Civil liberties therefore serve both as defenses against illegitimate state action and as mechanisms of democratic oversight, in order to prevent the exercise of political power from going against constitutional commitments. Without these safeguards, constitutional democracy will degenerate into authoritarian rule in the guise of legality.

Emergency Powers and Constitutional Limitations

Although civil liberties become the normative foundation of democratic government, emergency powers are constitutional devices used to deal with extraordinary threats which cannot be contained by normal legal mechanisms. Emergency itself is a situation of inconsistence with usual sustainability of the state, especially caused from the external aggression, war, rebellion, internal ruckus, etc. To ensure the survival of the nation, constitutions tend to grant extraordinary powers to governments, such as suspending some rights, holding preventive detention power, censorship power, or a centralizing control of federal structures.[7] Under Articles 352 to 360, Indian Constitution provides a long list of situations when national, state and financial emergency can be declared. Underlying this arrangement is a contradiction: the tools used to guard against threatening the constitutional order are the instruments

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[4] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) p. 23.

[5] H.M. Seervai, *Constitutional Law of India* (Universal Law Publishing, 2013) vol. I, p. 302.

[6] pendra Baxi, "The Little Done, the Vast Undone: Some Reflections on Reading Granville Austin's *Working a Democratic Constitution*" (2000) 9(1) *Journal of Indian Law and Society* 23.

[7] A.G. Noorani, *Constitutional Questions in India: The President, Parliament and the States* (Oxford University Press, 2000) p. 152.

by which derogations are made from the rights and freedoms that are fundamental to the constitutional order.

Constitutional theory laid stress on the emergency powers to be tied down by definite limits so that there are no chances of abuse. Such restriction may take various forms: procedural restrictions (approval by the parliament), substantive restrictions (non-derogability of other rights), time limit or duration of an emergency (no (indefinite) state of emergency). There is some precedent for such a balance, with warfare experience having been one of the two hands guiding the US Supreme Court towards this, with the other guiding German Basic to strike down any human dignity even below the line. In India, however, the example of the Emergency period (1975-77) demonstrated the dangers of unduly broad executive action emanating from the USSR, which were taken in terms that were positively deferred accordingly by the Second judges' players. This chapter in our history reminds us as to how important the limits of the constitution are in order to make sure emergency powers do not morph into weapons of repression.[8]

Finally, the tension between the right to freedom and emergency powers was proposed as evidence of the existence of a conflict engine even in democratic countries. Undetermined state of the constitutional systems and autonomy of the court are often crises. Although the state can justify its need of limiting its rights on the basis of necessity, in turn the validity of this step to be based on how they respect the limitation of the rights stated by the constitution and how the judiciary controls them. It is into this balancing act that the part of judiciary plays a pivotal role: do they sat and watched while the executive reign it's influence or do they take an active hand on the defense of civil liberties even at time of crisis.

3. Judicial Role in India: Key Case Law

Early Approach (A.K. Gopalan, etc.)

The first decades of the Indian judiciary can be summarized as when the basic rights were being construed formally, especially when a case concerned individual freedom. The landmark decision in *A.K. Gopalan v. State of Madras* (1950) illustrated this approach.[9] The complaint was against the Preventive Detention Act that belonging to the conviction of lack of objection, the requester has been intercepted and detained in reaction to his judicial observation made during the authorization of detention on the law, Article 19 and Article 21 of the constitution. On its part, the Supreme Court upheld the legislation and gave a restrictive interpretation of Article 21 by reserving the procedure set by the law to any procedure exercised by the legislature as any form of the procedure whether fair or just. This decision was an example of the judiciary taking recourse from the courts not to interfere with legislative and executive powers in the national security affairs; essentially creating a lesser precedent compared to liberty as a reflection of states.

This initial stage reflected the isolative nature of the easily compartmentalized approach taken by the court to major rights, considering each of the articles separately instead of as belonging to an overall plan. It was rather based on the literal interpretation of the text instead of substantive justice. Even though A.K. Gopalan did

[8] Raju Ramachandran, "Civil Liberties and the Indian Constitution" (2004) 39(10) *Economic and Political Weekly* 1029.

[9] *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

not shoot down that anyone can be denied liberty without a law, the ruling struck a blow against the spirit of liberty as the principle of legality was equalled to constitutionality. The court in this level appeared to be more submissive to the executive, which enforced a statist strategy which puts order and stability before liberty of people. It would precondition the future direction of the judiciary reaction during subsequent crises as the civil liberties issue opposed to the emergency powers.

The 1975–77 Emergency and ADM Jabalpur

The most debatable chapter in the history of the Indian Constitution took place in the case of Emergency declared by the Prime Minister Indira Gandhi in the years 1975-1977. The declaration, made under Article 352 in the name of internal disturbances, gave the executive blanket authority, such as preventive detention and a marking down of other inalienable rights. Here, one may refer to the case of ADM Jabalpur v. The Habeas Corpus case, also referred to as Shivkant Shukla (1976) took on a defining moment. The Supreme Court was to rule on the admissibility of the right to life and liberty under Article 21 in the case of the Emergency when Article 359 in force suspended the security of fundamental rights.[10] The Court, in a majority vote of 4:1, declared that in the Emergency, no one had locus standi to petition the courts to enforce his or her individual liberty, which granted the accused experience of indefinite detention with no judicial redress.

The case was strongly condemned to uphold dictatorship and nullify the judiciary as protector of the Constitution. The most renowned case brought out by Justice H.R Khanna during his dissent that the right to life is born out of nowhere and had relied solely on the Constitution instead of being innate and inalienable is a moral light amongst what many thought of as giving in to an executive whimper. The case represented how judges were not able to defend civil liberties in times when they were needed the most; and that was an indelible scar on the reputation of the judiciary. What the Emergency experience drove home was the perils of judicial deference to the executive, how irresponsible execute authority can put out constitutional liberties and how irresponsible abandonment on the part of the judiciary can hasten at the rate of degradation of democracy.

Post-Emergency Developments (Maneka Gandhi, etc.)

Although the post-Emergency years saw a vast transformation in the judicial philosophy, this was very much a reaction to the efforts of the Supreme Court to reclaim the respect and credibility that the judiciary had enjoyed as the protector of rights. It was the swamping point in Maneka Gandhi v. Union of India, (1978) in which the Court revived the interpretation of Article 21 in a broad way, such that it could not partially subdue the right to life and personal liberty except upon a procedure that was fair, just, and reasonable.[11] This was a break with the formalism of A.K.Gopalan depending on the formalism of the Indian Constitution like a standard of substantive due process. An additional finding made by the Court was that basic rights needed to be read as a component, totes, as opposed to the previous fragmented method.

This ruling had acted as the catalyst to special causation in term of jury activism and civil rights growth. Article 21 resulted in the recognition of the rights to privacy, right to legal assistance, right to a healthy environment and right to livelihood. The

[10] *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.
[11] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

Court adopted another more active posture in scrutinizing the acts of the executive also, which provided that the executions need proportionality, and fairness according to the courts, as important if it had to check the state authority.[12] Through such development of the doctrines as the structural basic nature, the judicial system employed constitutionalism against future crises. In such a way, the post Emergency jurisprudence was restorative and at the same time revolutionary as it heralded the change in direction toward a rights-conscious judicial position where past failures were taken into account and avoided in the future by all means.

Contemporary Trends

Even in recent decades, the Indian judicial system has maintained battle on the question of a balancing of liberty and security in the sphere of terrorism legislation and sanitized responses to the threat of population diseases. Both the Prevention of Terrorism Act (POTA), the Unlawful Activities (Prevention) Act (UAPA) and the National Security Act (NSA) have encountered judicial balancing acts of commitment to the liberty issue, both supporting preventive detention on grounds of national security but slapping down extravagant features. This dilemma was further brought to the fore when the courts were requested to make judgments on the places of the freedoms of private life, movement, and livelihood against the demands of the people occurring at the time of the COVID-19 pandemic.

On the one hand the court has widened its perspective of the rights provisions of Article 21, while on the other hand the attitude of the court on preventive detention and National Security Act is conservative, since it is ready to comply with the claim of necessity of the executive right.[13] At the same time, landmark cases like *K.S. Puttaswamy v. Union of India* (2017), which recognized the right to privacy as a fundamental right, demonstrate the Court's willingness to strengthen liberties against state encroachment. Currently, juridical system finds itself in quite inconvenient situation when it's becoming counter-majoritarian institution that protects rights and simultaneously is accused of inconsistency and selective assertiveness.[14] Emergency legacy persists and reminds the judiciary and the citizens in the whole that the civil liberties be protected at any moment more so in a state of emergency.

4. Comparative Perspectives

United States (Korematsu, Hamdi)

As a good example of how courts have made the balance between the national security and the individual liberties in times of emergency the jurisprudence of the United States is striking. In Korematsu v. United States (1944), brought infamous consequences to the history of the United States since the Supreme Court defended the internment of the Japanese-Americans during World War II on the grounds that the discrimination process was justified by the exciting interests of national security required by the government during this period.[15] The ruling has since been highly criticized as the lowest point in American constitutional history where fears and

[12] Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning* (Cambridge University Press, 2011) p. 189.
[13] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2017) p. 91.
[14] Arghya Sengupta, "Judicial Independence and the Separation of Powers in India" (2013) 46(3) *George Washington International Law Review* 743.
[15] *Korematsu v. United States*, 323 U.S. 214 (1944).

subordination to the executive can weaken civil liberties. The ruling which was successfully undermined several decades afterwards is a symptom of what judicial acquiescence can do in the face of perceived existential threats.

By contrast, *Hamdi v. Rumsfeld* (2004), decided in the context of the War on Terror, marked a more balanced approach.[16] Moreover, the Court held that those enemy combatants still found in the territory of the United States had the right to have their detention status determined in consultation with an independent adjudicator. Even though non-A reviewers could see that the President has extensive powers relating to exclusionary actions of national security interest, this Maybe what the Court meant was really actually that although broad-handed powers are present, they are not all-encompassing and would still have due procedure as a constitutional constraint. This evolution can be seen how the U.S. transposed between laws of deference and skepticism and reached the conclusion that crises are not entitled to eliminate constitutional rights completely.

United Kingdom (Liversidge, Belmarsh Case)

In the UK, the judicial approach to an emergency has changed drastically. The case of Liversidge v. Anderson (1942) summed it up when he said that executive discretion would be shown "-first, last, and always-a deference sustained on the part of the courts." During the Second World War the House of Lords upheld the actions of the House Secretary to be able to detain people without trial on the basic suspicion that they posed a threat to security.[17] Most people acknowledged that subjective contentment by the executive was enough thus putting judicial checks aside. The great disapproval of Lord Atkin, however, who demanded that in the collision of arms the laws take no voice, was the germ of further judicial vigilance in days to come.

Decades later, in *A and Others v. Secretary of State for the Home Department* (2004), also known as the Belmarsh case, the House of Lords adopted a far more rights-protective stance. It had already held foreign nationals without trial in anti-terror legislation due to the attacks on 9/11. The law had been a decisive loss in court in which the European Convention on Human Rights and proportionality principles were contravened.[18] It was the signal of the turning point of orientation that reflects a complete turn of the support of the judiciary to a more aggressive stance in following up that the counter-terrorism tends to be balanced with the basic liberties, even during the security risks.

Germany (Constitutional Court Jurisprudence)

Germany is one example, based on its historical experience of authoritarianism and the subsequent experiment on the drafting of the Basic Law (Grundgesetz) following World War II. The human dignity (Article 1) complies with the top of the German constitutional order, which is non-derogable regardless of the emergency. The Federal Constitutional Court has regularly been underlining the concept that even in the times of crisis, the basic rights cannot be suspended.[19] Indicatively, the Court has demanded stringent proportionality and necessity, in matters associated with

[16] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[17] *Liversidge v. Anderson* [1942] AC 206 (HL).
[18] *A and Others v. Secretary of State for the Home Department* [2004] UKHL 56.
[19] Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2012) p. 88.

surveillance and anti-terrorist efforts, so as to ensure state action does not go far beyond it is limited by narrow precision.

The German jurisprudence is shown to have shielded the subversion of the liberties of the civilians by placing some substantive tergum in the very constitutional document itself. The German system is more principled and consistent as compared to the case with the Indian and the British experience where judicial interpretations changed as a crash response.[20] The decision of the Federal Constitutional Court to regard some of the rights as virtually untouchable means that the rule of law will be strong and will therefore stop the incidences of authoritarian abuses that the country has been experiencing.

5. Critical Analysis

Activism vs. Judicial Restraint

The judicial action in the case of emergencies tend to swing over between two extremes; activism and restraint. Judicial activism was a trait of active interpretation of the clauses of the Constitution, the broadening of the rights understanding and the regulation of the state activity even during the crisis. It will enhance the counter-majoritarian role of the judiciary in that there will be no crisis where the executive overtakes. In India, *Maneka Gandhi v. Union of India* exemplifies this activist trend, where the Court not only read fairness into Article 21 but also established a standard that continues to inform rights adjudication.[21] Conversely, national security judicial restraint shows the inclination of using judicial restraint out of a fulfillment of the democratic philosophy which insists that the elected executive is in a far more superior position to deal with issues related to a national security crisis. The judgments in A.K. Gopalan and ADM Jabalpur reflect such a propensity wherein the judges favoured exercising discretion by executive more than constitutional protection.[22]

From the point of view of the judiciary, which should ensure the best transmittance of rights, this is the risk of complacency. Too much activism, on the other hand, is at most concerned with the hyperbolic use of institutional prerogatives and the making of a scare of elective weapon range of expression, which is voicing a democratic providing for.[23] This tension emerges also at the level of comparative experience: the deferential approach of the US Supreme Court in Korematsu is akin to the degeneration of India in ADM Jabalpur and more activist judicial intervention is marked in Hamdi and in the Belmarsh case of the UK. First, the concern is not with deciding one or the other, but with shifting the position of judicial action so as to allow for constitutional equilibrium but not democratic responsibility.

Balancing Liberty and Security

Emergency jurisprudence is based on the hard compromise between national security and civil liberties. Emergencies require fast and strong state measures but those actions tend to overstep on the individual rights. Courts are thus left with a dilemma of whether rights can be restricted and to what amount and on what grounds.

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[20] Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime" (2003) 2003(2) *Wisconsin Law Review* 273.

[21] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2006) p. 57.

[22] Fali S. Nariman, *India's Legal System: Can it be Saved?* (Penguin, 2006) p. 212.

[23] Sujit Choudhry, "He Had a Mandate: The Indian Supreme Court and the Basic Structure Doctrine" (2008) 12(2) *Public Law Review* 105.

It has been an imbalanced balance in India: as the judiciary had dumped their own liberty in the period of the 1975-77 Emergency, a restoration balance has come into place over the years of increasing the protections of Article 21. The introduction of the proportionality principle in subsequent cases evidences an attempt to make sure that state action is not arbitrary anymore, but is tied reasonably in its purpose.[24]

Proportionality has been institutionalised by Germany Constitutional Court as one dimension that is uncompromising to invoke, in that even under an emergency, state action is restricted and requirements of rights are not compromised. The Belmarsh (UK) case offers some powerful examples of the ways that the international human rights systems can be applied and used to craft conclusions in making judicial rulings. The American history offers the peril of too much security for the price of liberty as in Korematsu so too the judicial redress as in Hamdi to remind the constitutional boundaries.[25] To India, the major learning point is that the issue of liberty and security cannot be maintained at the same level to a dynamic judicial standard is needed but without touching upon the constitutional values.

Lessons for Democratic Governance

There have been important implications on democratic governance concerning the subject of emergency jurisprudence and the comparative experience. First, he notes the importance of the independent judiciary as the issue of Congressional misbehaviour by the executive.. A weak judicial control over crises in democracies means that these may simply become authoritarian as the case of the Emergency crisis in India of 1975-77 suggests.[26] Second, the cases demonstrate that the form in which the constitution is conceived is important: the more robust forms of abusive defense are provided by the constitutional design, frameworks based on non-derogable right (Germany), than by the ones grounded just on judicial discretion. Third, judicial philosophy rules decisively: the cases of Lord Atkin dissenting in Liversidge and of Justice Khanna dissenting in ADM Jabalpur and the ultimate reversal of Korematsu remind us how the energy of judicial philosophy may force constitutional culture into the margins and back then even.

To India, the larger principle is the judicial branch will be unable to stay neutral in any emergency situation, since pretending to be neutral in this situation will basically be to cater to the shaping powers of the executive branch. The courts have established mechanisms that will ensure future abrasion of liberties by using philosophies such as the substantive due process, proportionality, and the principle of the basic structure. Simultaneously, courts should not act as law-exempt officeholders that destabilize legislative and executive positions.[27] The challenge is to take a principled middle ground; aggressive but not so aggressive to falsely claim to defend the rights of the constitution, to avoid being inflexible and, by doing so, to fail to inadvertently insult democratic electoral rules. In this regard, the judiciary has an additional role beyond deciding on the case by case; it is a demonstration of keeping the moral and

[24] B.N. Kirpal et al. (eds.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, 2000) p. 293.
[25] Kim Lane Scheppele, "Emergency Powers and the Rule of Law After 9/11" (2004) 2(2) *Journal of Constitutional Law* 163.
[26] Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court" (2009) 8(1) *Washington University Global Studies Law Review* 1.
[27] Raju Ramachandran, "Judicial Restraint and Activism in Constitutional Adjudication" (2009) 4(1) *NUJS Law Review* 25.

constitutional fabric of the democracy intact through its most fragile and weakest dilemmas.

Conclusion and Suggestions

The issues concerning civil liberties versus the state of emergency power has always been said to be of tension especially within the constitutional democracies in which the state lives have been used against the rights of the individual. As revealed in this paper, the judiciary is in a contrasting position to affect a successful passage through this tension. The line in India has been shifted downward, out of deferential and formalist demeanour in A.K. Gopalan, to the controversial surrendering of liberties in ADM Jabalpur, and then, later, to rights-expansive jurisprudence in Maneka Gandhi and its aftermath. This transition is an example of the fragility and strength of the constitutional rights during the crisis. The exercise of judicial opinions and not only the text of the constitution of a country may tell whether civil liberties shall be supported or weakened under the pretext of the emergency.

These results are justified with the comparative investigation. Korematsu teaches Americans about the dangers of judicial deference run amok and Hamdi teaches us about what can be accomplished by the judicial process even in circumstances of national security emergency, of protecting the country, so that the scales of Tevah are reestablished. What has changed is the pendulum in the United Kingdom that swings between Liversidge and the Belmarsh case caused by the influence of the European human rights system on judiciary activism at the expense of executive activism.

With regard to the design of constitutions this article argues that an example for how design of constitutional provisions can embody contextually-dependent limits to emergence authorities exists in the German constitution and in particular in its non-derogatory formulation of the right to dignity and its unceasing employment of proportionality. Together, the experiences mentioned above go a long way in showing that while courts are not passive players, they are more so central figures that promote democratic accountability and constitutionalism.

Based on this analysis, some recommendations are found on how to integrate the role of the judiciary in defending civil liberties in case of an emergency. To start with, the doctrine of proportionality needs to be entrenched in Indian jurisprudence, relying on the principles that any deprivation in rights has to be motivated, precisely and closely attached to the judiciary critique. Second, some non-derogable rights, like those incorporated in Germany in the dignity clause, would be beneficial to protect even the most fundamental freedom even in times of the clearest crisis. Third, the judicial independence should be enhanced by transparency in appointments, sufficient resources and insulation against political pressure by the executive such that the courts can be allowed to take action decisively during crisis. Fourth, the judges on human rights and constitutional regulations during emergencies may be trained and sensitized to avoid such institutional failures, which took place in the Emergency of 1975-77.

Lastly, the judiciary has to develop an embracing constitutional culture that has not gone down each extreme of unquestioning obedience and inconsiderate activism. It serves not only to settle disputes, but to maintain of constitutional democracy the spirit of its everyday morality. However, they will only demonstrate whether democratic institutions can stand the test of time when an alert and scrupulous judiciary can make sure that the solemn commitments of the constitution are not breached even during the

times when the vulnerability of such a system is witnessed at its highest level. The Indian judiciary can build its life on the experiences it has learned through the course of mistakes and use them as the examples of related experiences to become stronger as the ultimately, it is called to be the defender of the liberty where the compromise between the security and the freedom does not make an intervention into the realm of errors.